Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES,

Petitioner,

v.

IRENE BLUMER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN COURT OF APPEALS, DISTRICT IV

PETITION AND APPENDIX FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This is a Medicaid case requiring interpretation of the spousal impoverishment provisions of the federal Medicaid Act, 42 U.S.C. § 1396r-5 (1994 and Supp. 2000). When a married individual institutionalized in a nursing home applies for Medicaid, the spousal impoverishment provisions of 42 U.S.C. § 1396r-5 permit the community spouse living at home to retain certain income and resources to meet his or her own monthly maintenance needs rather than using them to defray the medical expenses of the institutionalized spouse. In determining whether the community spouse is entitled under the statute to shelter resources in excess of the standard resource allowance, Wisconsin, like thirty-five other states, requires that income of the institutionalized spouse first be attributed to the community spouse to provide for his or her current needs. The question presented is:

Whether the "income first" requirement of the Wisconsin Medicaid spousal impoverishment statute, Wis. Stat. § 49.455(8)(d), requiring that the income of the institutionalized spouse be attributed to the community spouse before excess resources are transferred to the community spouse, conflicts with 42 U.S.C. § 1396r-5.

LIST OF PARTIES

Actual parties to the proceedings in the Wisconsin Court of Appeals and Wisconsin Supreme Court were:

The Wisconsin Department of Health and Family Services, State of Wisconsin,

Petitioner herein,

Irene Blumer, Petitioner-Appellant in the Wisconsin courts,

Respondent herein.

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ON PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN COURT OF APPEALS, DISTRICT IV

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Wisconsin Court of Appeals, District IV, is reported at 237 Wis. 2d 810, 615 N.W.2d 647 (2000). The order of the Wisconsin Supreme Court denying discretionary review is unreported.

JURISDICTION

The decision of the Wisconsin Court of Appeals was filed on June 8, 2000. Petitioner filed a timely petition for discretionary review in the Wisconsin Supreme Court. The order denying review was filed September 12, 2000 (App. 18a). Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (1994).

STATUTORY PROVISIONS INVOLVED

Because of their length, the spousal impoverishment provisions of the Medicaid Act, 42 U.S.C. § 1396r-5 (1994 and Supp. 2000), created by § 303 of the Medicare Catastrophic Coverage Act of 1988 (MCCA), Pub. L. No. 100-360, § 303, 102 Stat. 683, and of Wis. Stat. § 49.455 (1995-96) are set forth in the Appendix at 33a-76a.

The particular provision of the MCCA on which the court below relied when it concluded that the Wisconsin statute conflicts with the federal statute, 42 U.S.C. § 1396r-5(e)(2)(C), provides:

> If either such spouse establishes that the community spouse resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, there shall be substituted, for the community spouse resource allowance under subsection (f)(2) of this section, an amount adequate to provide such a minimum monthly maintenance needs allowance.

The "income first" provision of the Wisconsin Statutes contained in Wis. Stat. § 49.455(8)(d) (1995-96),[1] states in pertinent part:

> (8) FAIR HEARING. . . .
>
> . . . .
>
> (d) If either spouse establishes at a fair hearing that the community spouse resource allowance determined under sub. (6)(b) without a fair hearing does not generate enough income to raise the community spouse's income to the minimum monthly maintenance needs allowance under sub. (4)(c), the department shall establish an amount to be used under sub. (6)(b)3. that results in a community spouse resource allowance that generates enough income to raise the community spouse's income to the minimum monthly maintenance needs allowance under sub. (4)(c). Except in exceptional cases which would result in financial duress for the community spouse, *the department may not establish an amount to be used under sub. (6)(b)3. unless the institutionalized spouse makes available to the community spouse the maximum monthly income allowance permitted under sub. (4)(b)*
> . . . .

(Emphasis supplied).

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[1]Wisconsin Stat. § 49.455(8)(d) has not changed significantly since this case arose in 1996. *See* Wis. Stat. § 49.455(8)(d) (1997-98). However, the 1995-96 version of the statute is the one involved in this case.

STATEMENT OF THE CASE

A. Statutory Background.

Medicaid is a joint state and federal program designed to provide necessary medical care for persons unable to afford such care. *See* 42 U.S.C. §§ 1396-1396v (1994 and Supp. 2000). Generally, only those individuals with income and resources below prescribed levels are eligible for Medicaid. Where an individual's monthly income exceeds the prescribed level, the individual must, to be eligible for Medicaid, incur medical expenses sufficient to reduce his or her income to the prescribed level, a process known as "spending down." Excess resources must also be spent down[2] to the prescribed level.

The spousal impoverishment provisions of the federal Medicaid statute, 42 U.S.C. § 1396r-5, establish special rules for determining the Medicaid eligibility of married persons who are institutionalized, typically in a nursing home (the institutionalized spouse), and who have a spouse in the community (the community spouse).

Before 1988, individuals who qualified for Medicaid, either as "medically needy" or under an optional program, were required to apply much of their personal income to the cost of their nursing home care. Only limited amounts (which varied greatly from state to state) could be made available to a spouse living in the community. *See* H.R. Rep. No. 100-105, at 66-68 (1987), *reprinted in* 1988 U.S.C.C.A.N. 803, 889-91. In addition, except for a very low resource limit, resources owned either individually by the institutionalized spouse or jointly by both spouses

[2]In the context of Medicaid eligibility, "spending down" is technically limited to spending income. This petition also uses the term in a non-technical sense to refer to the liquidation and spending of resources.

were considered available solely for the costs of the care of the institutionalized spouse. *Id.* These income and resource limits had the effect of severely impoverishing the community spouse in many cases. *See Schachner v. Perales*, 85 N.Y.2d 316, 624 N.Y.S.2d 558, 648 N.E.2d 1321, 1322 (1995); *Mistrick v. Div. Med. Assist.*, 154 N.J. 158, 712 A.2d 188, 194 (1998).

At the same time, pre-1988 law left open loopholes that allowed couples to shelter large amounts of resources solely in the community spouse's name or in trusts so that the institutionalized spouse could qualify for Medicaid at a higher level of wealth than that contemplated for the program, which was designed to provide assistance to the poor. *See* H.R. Rep. No. 100-105, at 65-67, *reprinted in* 1988 U.S.C.C.A.N. at 888-90.

The purpose of the Medicare Catastrophic Coverage Act was to end the "pauperization [of the community spouse] by assuring that [he or she] has a sufficient—but not excessive—amount of income and resources available" while the other spouse is institutionalized. *See* H.R. Rep. No. 100-105, at 65, *reprinted in* 1988 U.S.C.C.A.N. at 888. The MCCA is the congressional response to the severe, impoverishing limitations under previously existing provisions of the Medicaid Act on the income and resources that a community spouse could retain to remain in the community. *See generally* H.R. Conf. Rep. No. 100-661, at 257-59 (1988), *reprinted in* 1988 U.S.C.C.A.N. at 1035-37. At the same time, Congress sought to end perceived abuses that permitted community spouses in some cases to insulate excessive amounts of the couple's assets from being used to defray the costs of care for the institutionalized spouse. *Cf.* H.R. Rep. No. 100-105, at 66-67, *reprinted in* 1988 U.S.C.C.A.N. at 889-90.

The spousal impoverishment provisions of 42 U.S.C. § 1396r-5, have six main subsections, § 1396r-5(a)-(f). *See*

id.; see generally H.R. Conf. Rep. No. 100-661, at 257-68, *reprinted in* 1988 U.S.C.C.A.N. at 1035-46. Subsection 1396r-5(a) provides that institutional spouses are entitled to special treatment in determining Medicaid eligibility and that the provisions of the MCCA supersede other provisions of the Medicaid Act which are inconsistent.

The Resource Provisions

Subsections 1396r-5(c) and (f) created new rules for the treatment of marital resources when an institutionalized spouse applies for Medicaid and, subsequently, when the institutionalized spouse seeks to transfer certain resources to the community spouse. Under subsection 1396r-5(c)(1), the total value of the couple's resources[3] at the beginning of the period of institutionalization is calculated and a one-half share is allocated to each spouse. Depending on the amount of each spouse's one-half share, the institutionalized spouse may need to spend virtually all of his or her resources in order to become Medicaid eligible. By contrast, the community spouse is permitted to retain a community spouse resource allowance (CSRA or "resource allowance"), which usually equals that spouse's entire one-half share.[4] The amount of the resource allowance can be adjusted at a fair hearing or by court order. *See* subsections (e)(2)(C) and (f)(2). The interspousal allocation of resources is made without regard to state marital or community property laws.

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[3]In making this calculation, "resources" does not include the home, an automobile, personal belongings and certain other forms of property. *See* 42 U.S.C. §§ 1396r-5(c)(5) and 1382b.

[4]Under subsection 1396r-5(f)(2)(A), the resource allowance does not equal the community spouse's one-half share when that share is below the resource allocation minimum (currently $50,000 adjusted annually), or above the maximum resource allocation (currently $84,120, adjusted annually). As adjusted, the maximum resource allowance in Wisconsin at the time Irene Blumer applied for Medicaid was then $76,740. Thus, for example, if a couple's joint resources then totaled $200,000, the resource allocation was $76,740, rather than one-half of $200,000.

The couple's resources are considered available to an institutionalized spouse (and therefore must be spent) only to the extent they exceed the resource allowance as of the time of application for Medicaid. *See* subsection (c)(2)(A) and (B). Once Medicaid eligibility is established for the institutionalized spouse, no resources of the community spouse can be deemed available to the institutionalized spouse (even if, by inheritance or otherwise, the community spouse later obtains significant additional resources). *See* subsection (c)(4).

The Income Provisions

Subsections 1396r-5(b) and (d) provide rules for the treatment of income, generally insuring that the community spouse has a protected level of income. Subsection (b) protects *any* income of the community spouse from being deemed available to the institutionalized spouse during months of institutionalization, incorporating the "name on the check" principle with regard to the community spouse. Under these rules, the community spouse's income is not considered in determining the Medicaid eligibility of the institutionalized spouse. Subsection (b) also provides special rules for the "attribution of income" of the institutional spouse for purposes of post-eligibility income adjustments authorized under subsection (d).

Once eligibility is established, subsection (d) protects the community spouse by allowing the institutionalized spouse to allocate part of his or her income to the community spouse, when necessary, before any remainder must be used to defray the costs of his or her institutional care. Subsection (d)(3) provides for the computation of the community spouse's minimum monthly maintenance needs allowance (MMMNA or minimum monthly need), an amount which ensures that the community spouse has

income significantly above the poverty level. *See* subsection (d)(3)-(4). Subsection (d)(2) authorizes a deduction from the institutionalized spouse's income if necessary to meet the minimum monthly need, a deduction called the community spouse monthly income allowance (CSMIA or income allowance[5]). This is the amount by which the minimum monthly need exceeds the monthly income otherwise available to the community spouse.

Remedial Provisions

Remedial provisions for notice and fair hearing are contained in subsection 1396r-5(e). In general, either spouse is entitled to a fair hearing if either is dissatisfied with the determination of the income allowance, the monthly income otherwise available to that spouse, the spousal share of resources under subsection(c)(1), the attribution of resources under subsection (c)(2) or the determination of the resource allowance. *See* subsection (e)(2)(A).

Under subsection (e)(2)(B), the hearing officer is authorized to revise the minimum monthly need upward under certain "exceptional circumstances." Under subsection (e)(2)(C) – the portion of 42 U.S.C. § 1396r-5 particularly at issue here – the hearing officer is authorized to revise the resource allowance when the "community spouse's income" is less than the minimum monthly need. (Increasing the resource allowance means that the institutionalized spouse has to spend down less of his or her resources, which would then go to the community spouse. The additional resources the community spouse may retain earns income that enables him or her to meet the minimum monthly need.)

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[5]The acronyms for terms defined by the MCCA, including CSRA, CSMIA and MMMNA, are commonly used in the cases and are set forth here for that reason. For easier recognition, however, this petition will generally use the shortened word form rather than the acronym.

B. Wisconsin's "income first" policy.

Wisconsin law, consistent with 42 U.S.C. § 1396r-5(e)(2)(C), requires the hearing officer to increase the amount of the resource allowance at a fair hearing if either spouse establishes that the standard resource allowance does not generate sufficient income to bring the community spouse's income up to the minimum monthly need. *Cf. id.*; Wis. Stat. § 49.455(8)(d) (1995-96). In doing so, however, Wisconsin allows increases in the standard resource allowance for the purpose of generating additional income for the community spouse only *after* excess income from the institutionalized spouse is attributed to the community spouse. *See id.*[6] This policy, which Wisconsin has enacted by statute, *see* Wis. Stat. § 49.455(8)(d), is known as the "income first" rule.[7]

The "income first" approach is employed by thirty-five other states besides Wisconsin in their statutes, administrative rules or state Medicaid policies.[8] In effect, the

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[6]Institutionalized spouses generally must use their income for the costs of care except for a $40 monthly personal needs allowance. The excess income that Wisconsin attributes to the community spouse is, thus, income that would ordinarily be spent on institutional care.

[7]*See, e.g., Chambers v. Ohio Dept. of Human Services*, 145 F.3d 793, 799-800 (6th Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S. Ct. 408; Ahmad, Omar N., "Medicaid Eligibility Rules for the Elderly and Long-Term Care Applicant," 20 Journal of Legal Medicine 251 at 660 (June 1999).

[8]According to a recent survey described by the state of New York in its Petition for Writ of Certiorari in *Novello v. Robbins*, No. 00-489 at 5 n.2 (filed September 28, 2000), quoted here by permission, the other "income first" states are Alabama, Arizona, Arkansas, California, Colorado, Delaware, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Oregon, South

"income first" rule requires couples to use a greater portion of their resources for spending down on medical care, thereby postponing Medicaid eligibility. *See Cleary ex rel. Cleary v. Waldman*, 167 F.3d 801, 805 (3d Cir.) ("*Cleary II*"), *cert. denied*, ___ U.S. ___, 120 S. Ct. 170 (1999).

Another group of states has adopted a "resource first" policy in the application of the fair hearing provisions of 42 U.S.C. § 1396r-5(e), as the Wisconsin Court of Appeals required in this case. Under the "resource first" approach, the institutionalized spouse is first permitted to transfer excess resources to the community spouse in order to generate additional income to raise his or her income to the monthly needs allowance. Only if the additional resources fail to do so does the institutionalized spouse transfer his or her excess income to the community spouse.[9] The effect of the

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Carolina, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia and Wyoming. Only a handful of states have codified the "income first" policy in a statute or administrative rule. *See* Cal. Welf. & Inst. Code § 14006.4 (Deering, LEXIS through 2000 Supp., 1999 Sess.); Colo. Rev. Stat. § 26-4-506 (1999); 10 Colo. Code Regs. 2505-10, § 8.112.13 (1999); Md. Regs. Code § 10.09.24.10-1.F.(4) (1998); N.J. Admin. Code § 10:71-5.7(d) (2000); Or. Admin. R. 461-160-0580(1)(f)(D) (2000). Wis. Stat. § 49.455(8)(d) (1997-98). In most "income first" states, the policy is set forth in an administrative directive or policy manual, or simply represents the State Medicaid agency's interpretation of the "community spouse's income" within the meaning of 42 U.S.C. § 1396r-5(e)(2)(C). *See, e.g.,* Delaware Division of Social Services Medical Assistance Manual (DSSM) 20995.3.2 and 20970; Michigan Medicaid Program Administrative Manual, Item 600, p. 33; Minnesota Dept. of Human Services Health Care Programs Manual § 0909.25.05 (1998); South Carolina Department of Social Services Medicaid Policy Manual § 12.06. The *Novello* petition does not involve any question concerning the validity of the "income first" rule itself, which was not challenged in that case. *See* petition in No. 00-489 at 5. Rather, *Novello* raises the ancillary question whether the application of the "income first" rule to the institutionalized spouse's social security income violates the anti-alienation provision of the Social Security Act, 42 U.S.C. § 407(a). *See* petition No. 00-489 at i.

[9]*See, e.g.*, 305 Ill. Comp. Stat. Ann. 5/5-4 (West 1998); Ill. Admin. Code, tit. 89, § 120.379 (West 2000); Mass. Gen. Laws ch. 118E,

"resource first" approach is to render the institutionalized spouse eligible for Medicaid much sooner without having to spend excess resources down to the ordinary resource limit.

Finally, still other states employ a hybrid approach, leaving to the hearing officer's discretion whether to consider any permissible income transfer before increasing the standard resource allowance.[10]

Policy statements issued by the Secretary of the Department of Health and Human Services (DHHS) and by its Health Care Financing Administration (HCFA), the federal agency responsible for administration of the Medicaid program, have expressly approved use of the "income first" approach, as well as other "reasonable interpretations" of the MCCA.[11]

C. Facts.

This case arose as a proceeding for judicial review under the Wisconsin administrative procedure act, of an administrative decision of the petitioner Department of Health and Family Services (Department). The undisputed facts are set forth in the decisions of the court of appeals and

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§ 21A(c) (West, WESTLAW through ch. 161 of 2000 2d Ann. Sess.); Mass. Regs. Code tit. 130, § 520.017(C) (2000). Both Massachusetts and Ohio formerly used an "income first" approach, but have switched to the "resource first" approach. *See Thomas v. Com'r, Div. of Med. Assistance*, 425 Mass. 738, 682 N.E.2d 874, 877 n.8 (1997) (noting statutory change); *Chambers*, 145 F.3d at 795; Ohio Admin. Code § 5101:6-7-02(C) (1999). *See generally Cleary v. Waldman*, 959 F. Supp. 222, 229-30 (D.N.J. 1997) ("*Cleary I*"), *aff'd*, *Cleary II*, 167 F.3d 801.

[10]*See Cleary I*, 959 F. Supp. at 229-30.

[11]*See* letter from DHHS Secretary Shalala to Ohio Governor Voinovich and a series of HCFA policy statements included in the Appendix to this petition at App. 78a-90a.

the hearing examiner (*see* App. 2a-3a, ¶¶ 2-4; *see also* App. 24a-26a).

Irene Blumer was admitted to a nursing home in 1994. In December 1996, she, through her husband, Burnett Blumer, applied for Medicaid. The Green County, Wisconsin, Department of Human Services conducted an asset assessment to determine whether Irene was eligible for Medicaid benefits. The assessment indicated that the couple had total assets of $145,644 in 1994 when Irene was admitted to the nursing home. The county set Burnett's resource allowance at $72,822, or one-half of the couple's non-exempt assets. Based upon this resource allowance, the County established a total resource limit of $74,822—$72,822 for Burnett, as the community spouse, and $2,000 for Irene,[12] as the institutionalized spouse, before Irene would be eligible for Medicaid. On the date of Irene's Medicaid application, the couple had resources totaling $89,335. The County denied Irene's institutional Medicaid application because the Blumers were $14,513 above their resource limit of $74,822. *See* App. at 3a, ¶ 2. (Put another way, the Blumers had to spend another $14,513 in resources before Irene would be eligible.)

Irene requested a hearing for the purpose of setting a higher resource allowance. At the hearing, evidence established that Burnett's total monthly income was $1,702.45, including his social security income, an annuity and income from his resource share, which generated $377.85 per month in interest and dividends. This amount was about $25 below Burnett's minimum monthly need of

[12]Individual Medicaid applicants are subject to a resource limit of $2,000. *See* 20 C.F.R. § 416.1205. The $2,000 limit applied to Irene by operation of 42 U.S.C. § 1396r-5(a)(1).

$1,727 then established by state and federal law.[13] Irene herself had monthly income of $1,162.71. She argued that because the resource allowance set by the county did not have the capacity to generate sufficient income to meet Burnett's monthly need, the examiner should increase the resource allowance. Increasing the resource allowance would also have allowed Irene to transfer assets to Burnett, thus avoiding having to spend down her resources on the cost of her care and making her eligible for Medicaid almost immediately. *See* App. 2a-3a, ¶ 3.

Under the "income first" rule, however, the simple solution to Burnett's $25 monthly shortfall was to attribute $25 of Irene's monthly income to him. *See* subsection (d)(1)(B). Applying Wis. Stat. § 49.455(8)(d), the hearing examiner concluded that he could not raise the resource allowance unless that was still necessary after Irene first made her income available to him. Because attributing Irene's available income to Burnett fulfilled the minimum monthly need shortfall, the hearing examiner concluded that Burnett's resource allowance should not be increased and that the county correctly denied Medicaid benefits to Irene. *See* App. 3a, ¶ 4.

D. Judicial proceedings below.

The Circuit Court of Green County affirmed the Department's decision in all respects (*see* App. 19a-22a) and Irene appealed. The court of appeals reversed, holding that the "income first" rule of Wis. Stat. § 49.455(8)(d) conflicts with 42 U.S.C. § 1396r-5(e)(2)(C). *See* App. 1a-2a, ¶ 1.

[13]The MMMNA in each state changes annually based on a statutory formula. *See* 42 U.S.C. § 1396r-5(d)(2)-(3). In Wisconsin, the current MMMNA is the lesser of $2,103 or $1,875 plus excess shelter expenses.

According to the court, 42 U.S.C. § 1396r-5(e)(2)(C) plainly and unambiguously requires the application of a "resource first" approach and does not permit the "income first" approach required by the Wisconsin statute. According to the state court, federal law requires that excess resources available to the institutionalized spouse be transferred to the community spouse to generate additional monthly income to make up the difference between the community spouse's personal income and the minimum monthly need *before* any available income possessed by the institutionalized spouse can be transferred to the community spouse (*see* App. 1a-2a, ¶ 1 and 7a-16a, ¶¶ 13-29).

The state court refused to give any deference to the informal views of either HCFA or the DHHS Secretary. According to the court, no deference is due because subsection 1396r-5(e)(2)(C) itself is plain and unambiguous (*see* App. 16a, ¶ 27).

The court below relied on two state intermediate appellate court decisions from Ohio decided in 1994. *See Kimnach v. Ohio Dept. of Human Serv.*, 96 Ohio App. 3d 640, 645 N.E.2d 825 (1994), *appeal not allowed*, 71 Ohio St. 3d 1447, 644 N.E.2d 409 (1995); *Gruber v. Ohio Dept. of Human Serv.*, 98 Ohio App. 3d 72, 647 N.E.2d 861 (1994), *appeal not allowed*, 71 Ohio St. 3d 1493, 646 N.E.2d 468 (1995). The court refused to give any weight to more recent federal and state decisions unanimously concluding that the "income first" approach is based on a reasonable interpretation of 42 U.S.C. § 1396r-5 as a whole. *See Cleary II*, 167 F.3d at 811-12; *Chambers*, 145 F.3d at 802-04; *Cleary I*, 959 F. Supp. 222; *Thomas*, 682 N.E.2d at 879-81; and *Golf v. State Dept. of Social Services*, 91 N.Y.2d 656, 697 N.E.2d 555, 558-63 (1998).

The Department sought discretionary review by the Wisconsin Supreme Court on the federal question presented.

That court denied review in an order dated September 12, 2000 (*see* App. 18a).

REASONS FOR GRANTING REVIEW

The court of appeals itself clearly recognized that its interpretation of the federal Medicaid spousal impoverishment statute directly conflicts with the view of all of the federal courts which have addressed whether the "income first" approach is permissible under federal law. In addition, while the decision is consistent with two state intermediate appellate decisions from Ohio, it directly conflicts with decisions of the highest courts of New York and Massachusetts. *Cf.* Sup. Ct. R. 12(b). Further, the court of appeals' decision conflicts with the expressed views of the federal agency charged with implementing the statute.

This case presents a significant federal question concerning the scope of the states' discretion to administer the spousal impoverishment provisions of the federal Medicaid law in accordance with state attribution of income requirements. The "income first" policy is in effect in at least thirty-five other states besides Wisconsin. Its invalidation will have a significant fiscal impact on Wisconsin and federal Medicaid costs and, potentially, on other "income first" states as they struggle to control Medicaid costs while administering the program in a fair and equitable manner.

Finally, the court is wrong in regarding the federal spousal impoverishment statute as plain and unambiguous and in concluding that the "income first" rule of Wis. Stat. § 49.455(8)(d) conflicts with 42 U.S.C. § 1396r-5(e)(2)(C).

ARGUMENT

I. THE DECISION BELOW DIRECTLY CONFLICTS WITH DECISIONS OF THE THIRD AND SIXTH CIRCUITS, DECISIONS OF THE HIGH COURTS OF NEW YORK AND MASSACHUSETTS AND THE VIEWS OF THE HEALTH CARE FINANCING ADMINISTRATION.

As the Wisconsin Court of Appeals recognized, its decision directly conflicts with federal and state precedent in the Third and Sixth Circuits and in the high courts of New York and Massachusetts (*see* App. at 9a-11a, ¶¶ 16-19). Those courts, as well as HCFA, have consistently rejected the reasoning of the court of appeals, recognizing that the spousal impoverishment provisions of the MCCA are complex, interlocking and ambiguous and that 42 U.S.C. § 1396r-5(e)(2)(C) cannot be interpreted without reference to § 1396r-5 as a whole or to the statutory policies the MCCA is intended to serve.

More significantly, each of these courts, together with HCFA, have rejected the result of the court of appeals, holding instead that 42 U.S.C. § 1396r-5(e)(2)(C) *permits* the application of the "income first" rule embodied in Wis. Stat. § 49.455(8)(d). *See Chambers*, 145 F.3d at 802 (holding that subsection (e)(2)(C) does not have a "plain meaning" that mandates a "resource first" approach); *Cleary I*, 959 F. Supp. at 232-34; *Cleary II*, 167 F.3d at 811-12 (deferring to views of HCFA and DHHS and holding that the state did not violate the MCCA by employing the "income first" approach in determining the Medicaid eligibility of an institutionalized spouse); *Golf*, 697 N.E.2d at 559-63 (MCCA is silent or ambiguous as to meaning of "community spouse's income" in subsection (e)(2)(C); "income first" method is based on a

reasonable interpretation of the statute and is consistent with the policies underlying the statute); *Thomas*, 682 N.E.2d at 879-81 ("income first" rule did not frustrate policy objectives of the MCCA; noting the unlikelihood that Congress would require the states to create an endowment to provide the community spouse with income and thereby immunize a substantial share of the institutionalized spouse's resources from having to pay for nursing home care). *But see Kimnach*, 645 N.E.2d at 629; and *Gruber*, 647 N.E.2d at 862-63 (concluding that the statute is unambiguous and forbids application of "income first" approach).

HCFA, the federal agency responsible for administration of the Medicaid program, has expressly indicated that Wisconsin and other states have discretion to employ "income first," unless and until HCFA itself implements an administrative rule which limits the states' discretion in this respect. *See* App. 84a-90a; *cf.* App. 78a-83a. This Court has long recognized that even informal policy interpretations by the agency charged with administration of a statute are entitled to some level of deference so long as they are informed, reasonable and persuasive. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *see also Christensen v. Harris County*, ___ U.S. ___, 120 S. Ct. 1655, 1662-63 (2000).

Because of the statutorily required fair hearing process and the availability of judicial review under state administrative procedure acts, the validity of discretionary policies like "income first" are most frequently litigated in the state courts. When state courts refuse to accord any deference to the expressed views of the federal agency responsible for administration of the program or to recognize the persuasive value of federal appellate decisions directly on point, a state like Wisconsin has no recourse except in this Court.

II. WHETHER STATES HAVE DISCRETION UNDER THE MCCA TO EMPLOY AN "INCOME FIRST" POLICY IS A SIGNIFICANT FEDERAL QUESTION THAT WILL HAVE A SUBSTANTIAL FISCAL IMPACT ON WISCONSIN AND OTHER STATES EMPLOYING THAT POLICY.

Although the Medicaid Act imposes certain minimum and maximum benefits and requires states to meet various minimum standards, most benefits provided under the Act are optional and states are afforded a great deal of discretion in the manner in which their individual programs are implemented. Indeed, variance among individual state Medicaid programs is not only common but inherent in the Medicaid system.

The spousal impoverishment provisions of the MCCA are no exception to the rule that states ordinarily have great discretion in the manner in which they construct their individual state Medicaid plans. *See*, *e.g.*, 42 U.S.C. § 1396r-5(d)(3) (setting the minimum monthly need); *id.*, § 1396r-5(f)(2)(A)(i) (determining the resource allowance). Whether states have such discretion in the administration of the fair hearing provisions of 42 U.S.C. § 1396r-5(e) presents a significant federal question in how states administer their statewide Medicaid programs. If the states lack the authority to employ the "income first" approach, as the court below decided, the decision will require significant changes in the way Wisconsin and many other states have routinely administered the spousal impoverishment protections of the MCCA.

Requiring Wisconsin to abandon its "income first" approach and to adopt a "resource first" approach instead will also impose a substantial financial burden on both the state

and federal governments that has no basis in the competing policies the MCCA is intended to serve. Under the "income first" approach, Wisconsin attributes a median amount of about $992 each per month of each institutionalized spouse's income to the community spouse in order to provide the latter with income up to the minimum monthly need level. Employing "income first," couples typically are able to provide the community spouse with sufficient income to meet the minimum monthly need, while the institutionalized spouse is required to spend excess resources above the total of the resource allowance and the limited amount the institutionalized spouse is allowed to keep. Under the "income first" policy, then, Wisconsin is able both to provide community spouses with adequate income to meet the minimum monthly need and to maintain rough equity in the maximum amount of resources which are protected for the community spouse, consistent with the standard resource allowance.

If excess resources must be transferred to the community spouse before income (as the "resource first" approach requires), the institutionalized spouse will become eligible for Medicaid much earlier without being required to spend excess resources down to the level normally required under the spousal impoverishment provisions of the MCCA.

Not only does this create inequities among Medicaid recipients, the additional state and federal costs to the Medicaid program will be significant. If Wisconsin cannot attribute a median income of $992 monthly for the support of the community spouse, as it now does in spousal impoverishment cases, the resulting fiscal impact will be substantial because a large amount of resources must be

transferred from the institutional spouse in order to generate income of $992 monthly or $11,928 annually.[14]

The petitioner Department estimates that, based on the current cost of institutional care, the total additional cost to the Medicaid program *per month* for each new case in which the state must use the "resource first" approach would be about $2,000. Based on an estimated average of 50 months of nursing home care per case, the total state and federal cost for every 100 new cases would be approximately $10 million.[15] The state's share would be approximately $4 million or 40% of that total. The total number of new cases and the resulting costs will be correspondingly higher if, as anticipated, elder law practitioners adjust financial planning strategies in response to the *Blumer* decision.

If followed by other states, both the state governments and the federal government would be subjected to substantially increased Medicaid costs.

[14]Resources valued at approximately $340,000 are necessary to generate monthly income of $992, assuming a 3.5% rate of return. Resources of approximately $300,000 are required to generate the same amount of income, assuming a 4% rate of return. Thus, using resource first, an institutionalized spouse having as much as $340,000 or more in excess resources could become immediately eligible for Medicaid if his or her community spouse has income typical of other Wisconsin community spouses.

[15]The estimate is based on a cost per 100 cases because it was not possible to estimate the number of new cases that will arise per year.

III. THE COURT BELOW WAS WRONG: THE "INCOME FIRST" POLICY IS BASED ON A REASONABLE INTERPRETATION OF 42 U.S.C. § 1396r-5.

Subsection 1396r-5(e)(2)(C) is one brief subsection of the long and complex spousal impoverishment statute, 42 U.S.C. § 1396r-5. This provision authorizes the hearing officer to supplement the standard resource allowance with additional resources when the standard allowance does not raise "the community spouse's income" to the minimum monthly need level. "Community spouse's income" is not otherwise defined, in contrast to other carefully defined terms like the minimum monthly need (MMMNA), the resource allowance (CSRA) or the income allowance (CSMIA). Subsection (e)(2)C) does not, for example, indicate whether the term "community spouse's income" is restricted to his or her individual income or whether it may include income from the institutionalized spouse. Yet the statute itself expressly contemplates attribution of the institutional spouse's available income to the community spouse as a means of ongoing support. *See* subsection 1396r-5(d).

Nowhere does subsection (e)(2)(C) preclude or forbid the "income first" approach of attributing the institutional spouse's income to the community spouse in order to raise the latter's monthly income level. Rather, subsection (e)(2)(C) is "entirely silent" on this point. *See Golf*, 697 N.E.2d at 558. Moreover, the subsection does not expressly require a "resource first" approach, although the Senate version of the bill, not finally enacted, contained such a provision. *See* H.R. Conf. Rep. No. 100-661, at 263-65, *reprinted in* 1988 U.S.C.C.A.N. 1041-43.

Despite this, the court below, looking at subsection 1396r-5(e)(2)(C) in isolation, concluded that the meaning of that provision was clear and then interpreted the

remainder of 42 U.S.C. § 1396r-5 to fit what it saw as the clear meaning of the former. The court's approach turns the ordinary process of statutory interpretation on its head, reversing the normal order for discerning the meaning of a statute as a whole.

The first step in determining the proper construction of the federal statute is to examine its text. *See Negonsott v. Samuels*, 507 U.S. 99, 104-05 (1993) ("we begin with the text of" the act). Although the issue in this case focuses on the interpretation of 42 U.S.C. § 1396r-5(e)(2)(C), "a statute is to be read as a whole . . . since the meaning of statutory language, plain or not, depends on context." *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (internal citation omitted); *cf. National Labor Relations Board v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941). Accordingly, a court must first analyze how subsection (e)(2)(C) fits into § 1396r-5 as a whole in order to determine whether that provision is susceptible to a single plain reading or not.

The better view, consistent with the federal and state high courts which have analyzed subsection (e)(2)(C) in the context of the statute as a whole, is that subsection (e)(2)(C) is ambiguous. *See* cases described at 16-17 above. *See also Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 739 (1996) (conflict between court decisions alone suggests statute is ambiguous).

The second error infecting the decision of the court below is that the court refused to give any deference whatever to the interpretation of 42 U.S.C. § 1396r-5 by the federal and state agencies responsible for administration of the Medicaid program, based on the court's insistence that subsection (e)(2)(C) has a plain meaning. But the court's reasoning on that point is fundamentally flawed, as discussed above. Moreover, who has a more informed position from which to evaluate in the first instance whether provisions of a notoriously complex set of federal statutes like the Medicaid Act, or the spousal impoverishment statute in particular, has a plain meaning or not, than the administrative agencies charged with their administration? *Cf. Cleary II*, 167 F.3d at 811-13 (HCFA and DHHS policy statements are reasonable and consistent with the language and purposes of the MCCA and thus entitled to deference).

CONCLUSION

For the reasons discussed above, this Court should issue a writ of *certiorari* to review the decision of the Wisconsin Court of Appeals, District IV.

Respectfully submitted,

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December 2000

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COURT OF APPEALS
DECISION
DATED AND FILED

June 8, 2000

No. 99-1053

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT IV

IRENE BLUMER,

PETITIONER-APPELLANT,

v.

WISCONSIN DEPARTMENT OF HEALTH AND
FAMILY SERVICES,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Green County: JAMES R. BEER, Judge. *Reversed and cause remanded with directions for further proceedings consistent with this opinion.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

¶1 ROGGENSACK, J. Irene Blumer appeals from a decision of the Department of Health and Family Services (DHFS) to deny her Medical Assistance (MA) benefits. Irene claims the hearing examiner erred in applying the "income-first" rule instead of the "resource-first" rule

when determining whether to increase the community spouse resource allowance. The hearing examiner's decision was based on a provision found in the Wisconsin Statutes but not contained in federal law. Because we conclude that Wisconsin's income-first rule impermissibly conflicts with federal law, we reverse.

BACKGROUND

¶2 The facts of this case are not in dispute. Irene Blumer was admitted to a nursing home in 1994. In December 1996, she, through her husband, Burnett Blumer, applied for MA. The Green County Department of Human Services conducted an asset assessment to determine whether Irene was eligible for MA benefits. The assessment indicated that the couple had total assets of $145,644 in 1994 when Irene was admitted to the nursing home. The County set Burnett's community spouse resource allowance (CSRA) at $72,822, or one-half of the couple's non-exempt assets. Based upon this CSRA, the County established a total asset limit of $74,822-$72,822 for Burnett, as the community spouse, and $2,000 for Irene, as the institutionalized spouse, before Irene would be eligible for MA. The County then examined the current total assets of the couple as of the date the application for MA was made and concluded that the couple had assets of $89,335. The County denied Irene's MA application because the Blumers were $14,513 above their asset limit of $74,822.

¶3 Irene requested a hearing for the purpose of setting a higher CSRA. At the hearing, it was established that Burnett's share of assets generated $377.85 per month in interest and dividends. Combined with his social security payments and those from an annuity which Burnett held, the hearing examiner concluded that Burnett's total monthly income was $1,702.45. This amount is below the minimum monthly maintenance needs allowance (MMMNA) of $1,727 established by federal law, as the minimum monthly income

a community spouse would need to live independently. *See* 42 U.S.C. 1396r-5(d)(3) (1994).[1] Irene argued that because the CSRA set by the County did not have the capacity to generate sufficient income to meet Burnett's MMMNA, the examiner should have set a higher CSRA so that Burnett would have more assets to generate more income. Setting a higher CSRA would allow a transfer assets to Burnett, thereby making Irene eligible for MA sooner.

¶4 Based on WIS. STAT. § 49.455(8)(d) (1995-96),[2] the hearing examiner concluded that he could not raise the CSRA, thereby permitting a transfer of assets to Burnett until Irene first made all of her income available to him. By imputing Irene's social security retirement income and her pension to Burnett, the hearing examiner concluded that he had a monthly income of more than $2,000, well above the MMMNA established by federal statute. Therefore, the hearing examiner determined that no additional assets above the initially established CSRA needed to be retained by Burnett, the community spouse, and that the County correctly denied MA benefits to Irene. Irene petitioned the circuit court for review, which affirmed the agency's decision in all respects. Irene appeals.

DISCUSSION

Standard of Review.

¶5 In an appeal of an administrative agency decision, we review the decision of the agency, not that of the circuit court. *See* ***Lilly v. DHSS***, 198 Wis. 2d 729, 734, 543 N.W.2d 548, 550 (Ct. App. 1995). The interpretation

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[1] All references to the United States Code are to the 1994 version. The sections pertinent to this opinion were not substantially changed from 1994 to 1996, when the application for benefits was made.

[2] All references to the Wisconsin Statutes are to the 1995-96 version unless otherwise noted.

and application of WIS. STAT. § 49.455 and 42 U.S.C. § 1396r-5 to undisputed facts are conclusions of law. *See* ***Gordon v. State Med. Examining Bd.***, 225 Wis. 2d 552, 556, 593 N.W.2d 481, 483 (Ct. App. 1999), *review denied*, ___ Wis. 2d ___, 599 N.W.2d 409 (1999). Although we are not bound by an agency's conclusions of law, in certain instances, we give an agency's conclusions one of three standards of deference: (1) great weight deference; (2) due weight deference; or (3) no deference. *See* ***UFE Inc. v. LIRC***, 201 Wis. 2d 274, 284, 548 N.W.2d 57, 61 (1996). However, an administrative interpretation "'is only of significance where there is an ambiguity in the statute. It cannot overcome the plain wording of a statute where there is no ambiguity.'" ***Lincoln Sav. Bank, S.A. v. DOR***, 215 Wis. 2d 430, 443, 573 N.W.2d 522, 528 (1998) (citation omitted).

¶6 DHFS argues that its interpretation of the applicable statutory provisions is entitled to, at minimum, due weight deference because it has interpreted the state and federal medical assistance statutes for more than a decade. Irene points out, however, that she does not contend that DHFS is misinterpreting a provision in the law. Instead, she argues that the state provision relied upon by DHFS to deny her benefits directly conflicts with federal law, which it may not do. *See* 42 U.S.C. § 1396a(a)(17)(A); ***Schweiker v. Gray Panthers***, 453 U.S. 34, 37 (1981). When the matter was before the hearing examiner, it did not undertake any analysis of federal law, but simply denied the benefits because of WIS. STAT. § 49.455(8)(d). Therefore, we agree with Irene that it is not the agency's interpretation of a statute that is at issue; but rather, whether the state statute conflicts with federal law. Accordingly, we conclude that the appropriate standard of review is *de novo*.

Overview of Medical Assistance.

¶7 Medical Assistance, also known as Medicaid, is a joint federal-state program that was established in 1965 as Title XIX of the Social Security Act. In addition to other benefits, the program provides coverage for elderly persons whose income and resources are insufficient to meet the costs of medical services, such as nursing home care. For states that participate in the program, such as Wisconsin, the federal government provides partial funding and establishes mandatory and optional categories of eligibility and services covered. Although states are given wide latitude to adopt standards for determining the extent of MA, no state may adopt programs or policies that violate a mandate of the Act. *See 42* U.S.C. § 1396a(a)(17)(A); ***Schweiker***, 453 U.S. at 37.

¶8 In 1988, Congress enacted the Medicare Catastrophic Coverage Act of 1988 (MCCA). *See* 42 U.S.C. § 1396r-5. The MCCA sought to protect married couples where one spouse was institutionalized in a nursing home; so that the spouse who continued to reside in the community was not impoverished and had sufficient income and resources to live independently. *See* H.R. REP. NO. 100-105(II), at 65 (1988), *reprinted in* 1988 U.S.C.C.A.N. 857, 888. Prior to 1988, the medical assistance eligibility rules required a couple to deplete their resources before the institutionalized spouse was eligible for benefits. This process often left the community spouse impoverished and unable to live without public assistance.

¶9 The MCCA was designed to govern the calculation of both resources and income allocable to each spouse for purposes of Medicaid eligibility. It treats resources and income differently, and both need to be evaluated when determining whether an applicant is eligible for MA benefits. The term, "resources," is roughly equivalent to assets, while income corresponds to the

income-generating potential of those assets and to additional income such as social security or pension payments.

¶10 When an application for MA is made, the couple's total resources are calculated as of the date that continuous institutionalization began for the institutionalized spouse, and then a share of those resources is allocated to each spouse.[3] The amount of resources allocated to the community spouse is called the community spouse resource allowance (CSRA). The CSRA is considered an unavailable asset in determining the MA eligibility of an institutionalized spouse.

¶11 When an application for MA is made, in addition to the CSRA, a community spouse is entitled to income in an amount sufficient to meet the minimum monthly maintenance needs allowance (MMMNA). *See* 42 U.S.C. § 1396r-5(d)(3); WIS. STAT. § 49.455(4). The MMMNA is designed to ensure that, if possible, the community spouse will have income (as opposed to resources) above the poverty level.[4] Both federal and state statutes incorporate the "name on the check" principle, whereby at the time an application for MA is made, income is considered available only to the spouse in whose name the payment is made. *See* 42 U.S.C. § 1396r-5(b); § 49.455(3)(b). Payment made in the name of both spouses is equally divided, initially.

¶12 If either spouse is dissatisfied with the CSRA as set by the County, or if the community spouse's income is

[3] Federal law requires that the asset assessment be conducted as of the date that continuous institutionalization began, not the date on which the application for MA was made. *See* 42 U.S.C. § 1396r-5(c)(1)(A).

[4] At the time of Irene's application, the MMMNA, as established by federal statute, was 150% of the federal poverty line, which was $1,727 per month.

insufficient to meet the MMMNA, he or she may request a fair hearing. *See* 42 U.S.C. § 1396r-5(e); WIS. STAT. § 49.455(8). Section 49.455(8)(d) of the Wisconsin Statutes is critical to this appeal because it requires a hearing examiner to first impute all of the institutionalized spouse's income to the community spouse (income-first) if the community spouse's income is insufficient to meet the MMMNA, as opposed to transferring more of the couple's income-generating assets to the community spouse (resource-first) in order for that spouse to have sufficient income-generating capacity to meet the MMMNA.

The Blumers' Application.

¶13 When income in Burnett's name was combined with the income-generating capacity of Burnett's CSRA, he had insufficient income to meet the MMMNA. The central issue in this case is whether the income-first approach, used by the hearing examiner to supplement Burnett's MMMNA is in conflict with federal law. The federal provision at issue is found at 42 U.S.C. § 1396r-5(e)(2)(C) and it provides:

> **Revision of community spouse resource allowance.** If either such spouse establishes that the community spouse resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, there shall be substituted, for the community spouse resource allowance under subsection (f)(2) of this section, an amount adequate to provide such a minimum monthly maintenance needs allowance.

¶14 Wisconsin's provision relative to requesting a new CSRA as established by a fair hearing is similar to the federal provision and it provides:

> If either spouse establishes at a fair hearing that the community spouse resource allowance determined under sub. (6)(b) without a fair hearing does not generate enough income to raise the community spouse's income to the minimum monthly maintenance needs allowance under sub. (4)(c), the department shall establish an amount to be used under sub. (6)(b)3. that results in a community spouse resource allowance that generates enough income to raise the community spouse's income to the minimum monthly maintenance needs allowance under sub. (4)(c).

WISCONSIN STAT. § 49.455(8)(d). However, part of subsection (8)(d) is not found in federal law. It states:

> Except in exceptional cases which would result in financial duress for the community spouse, the department may not establish an amount to be used under sub. (6)(b)3. unless the institutionalized spouse makes available to the community spouse the maximum monthly income allowance permitted under sub. (4)(b) or, if the institutionalized spouse does not have sufficient income to make available to the community spouse the maximum monthly income allowance permitted under sub. (4)(b), unless the institutionalized spouse makes all of his

> or her income . . . available to the community spouse . . .

Therefore, by enacting subsection (8)(d), the Wisconsin legislature mandated that DHFS adopt an income-first approach instead of a resource-first approach in determining whether to raise a community spouse's CSRA.

¶15 Irene contends that when an application for MA is made, the plain language of the federal statute directs a state to increase the CSRA if the community spouse has income that is insufficient to meet the MMMNA. Therefore, Irene argues that WIS. STAT. § 49.455(8)(d), which requires the hearing examiner first to impute the institutionalized spouse's income to the community spouse, contravenes federal law and is invalid. She cites out-of-state cases which have so held. ***See Gruber v. Ohio Dep't of Human Servs.***, 647 N.E.2d 861 (Ohio Ct. App. 1994); ***Kimnach v. Ohio Dep't of Human Servs.***, 645 N.E.2d 825 (Ohio Ct. App. 1994).

¶16 DHFS contends, on the other hand, that the federal spousal impoverishment provisions found in 42 U.S.C. § 1396r-5 are ambiguous and that, while income-first is not mandated under federal law, it is permissible. In support of its contention, the DHFS relies on its interpretation of the legislative history underlying these provisions and some of the informal interpretations of the federal agency charged with administering Medicaid. DHFS also cites several out-of-state cases in which courts have declared that the federal statute is ambiguous. *See, e.g.*, ***Cleary v. Waldman***, 959 F. Supp. 222, 228-29 (D.N.J. 1997) (***Cleary I***); ***Cleary v. Waldman***, 167 F.3d 801, 807 (3d Cir. 1999) (***Cleary II***), *cert. denied*, 120 S. Ct. 170 (1999); ***Chambers v. Ohio Dep't of Human Servs.***, 145 F.3d 793, 802 (6th Cir. 1998), *cert. denied*, 525 U.S. 964 (1998); ***Golf v. New York State Dep't of Soc. Servs.***, 697 N.E.2d 555, 556-57 (N.Y. 1998).

¶17 When we construe a statute, our aim is to ascertain the intent of the legislative body. *See* ***Truttschel v. Martin***, 208 Wis. 2d 361, 365, 560 N.W.2d 315, 317 (Ct. App. 1997). In so doing, we begin with the plain meaning of the language chosen. *See* ***id.*** "If the language employed is clear and unambiguous, that is conclusive of legislative intent. Our inquiry ends, and we must apply the plain meaning of the statutes to the facts of this case." ***Cemetery Servs., Inc v. Department of Regulation & Licensing***, 221 Wis. 2d 817, 825, 586 N.W.2d 191, 195 (Ct. App, 1998), *review denied*, 225 Wis. 2d 488 (1999). Only if a statutory provision is ambiguous do we resort to rules of statutory construction, such as legislative history, to determine legislative intent. *See* ***J.A.L. v. State***, 162 Wis. 2d 940, 962, 471 N.W.2d 493, 502 (1991). Additionally, a statute is not rendered ambiguous merely because the parties disagree as to its meaning. *See* ***State v. Orlik***, 226 Wis. 2d 527, 534, 595 N.W.2d 468, 472 (Ct. App. 1999). And, legislative history may not be used to create an ambiguity in otherwise plain statutory language. *See* ***Johnson v. County of Crawford***, 195 Wis. 2d 374, 383, 536 N.W.2d 167, 170 (Ct. App. 1995).

¶18 DHFS does not articulate why or how it believes 42 U.S.C. § 1396r-5(e)(2)(C) is ambiguous. Instead, it points to out-of-state cases which have examined the issue before us and have concluded subsection (e)(2)(C) of the federal statute is ambiguous. A close review of those cases, however, reveals that the courts have stated their conclusions in broad strokes, such as opining that the spousal impoverishment provisions are complex; and therefore, it is impossible to attach a plain meaning to any provision. While we may agree that these provisions are complex, we cannot agree that every provision is ambiguous simply because of the complexity of the statute as a whole.

¶19 Additionally, some courts, in reasoning that the statute is ambiguous, have seized upon the phrase "community spouse's income" in 42 U.S.C. § 1396r-5(e)(2)(C) because that term is not specifically defined in the statute. They have concluded that it is reasonable to interpret "community spouse's income" as an amount that includes the imputation of income paid in the name of the institutionalized spouse. Based upon DHFS's citation of these cases, we view its assertion of ambiguity as a contention that the phrase, "community spouse's income," is ambiguous. We disagree.

¶20 First, the language of 42 U.S.C. § 1396r-5(e)(2)(C) mandates that if either spouse establishes that the CSRA is inadequate (in relation to the amount of income it has the capacity to generate) to raise the community spouse's income to the level of the MMMNA, there shall be substituted a higher CSRA: "there shall be substituted, for the community spouse resource allowance under (f)(2) of this section, an amount adequate to provide such a minimum monthly maintenance needs allowance." This language very specifically directs the increase of the CSRA to an amount sufficient to generate additional income to meet the MMMNA. There is no direct or specific language that imputation of the institutionalized spouse's income should occur before raising the CSRA. Further, the language of the statute speaks of "the *community spouse's* income," not the couple's income or the community spouse's income plus the institutionalized spouse's income. This is consistent with the separate treatment of each spouse's income throughout § 1396r-5. Therefore, we conclude that the specific language of the statute contemplates that the hearing examiner will separate the community spouse's income from that of the institutionalized spouse's and consider only the community spouse's income in its review of whether the CSRA that has been established is sufficient to avoid impoverishment of the community spouse.

¶21 Additionally, the CSRA is established only when the application of the institutionalized spouse is reviewed for MA eligibility. The statute provides that either spouse may request a hearing "if an application for benefits . . . has been made . . . ." *See* 42 U.S.C. § 1396r-5(e)(2)(A). Therefore, establishing the CSRA is a *pre-eligibility* determination, not a *post-eligibility* one. However, § 1396r-5(d)(1) directs the institutionalized spouse to transfer income to the community spouse *after* eligibility has been determined, not before eligibility bas been established. Section 1396r-5(d)(1) provides:

> **Protecting income for community spouse. (1) Allowances to be offset from income of institutionalized spouse.** *After an institutionalized spouse is determined . . . to be eligible for medical assistance,* . . . there shall be deducted from the spouse's monthly income . . . [a] community spouse monthly income allowance . . . but only to the extent income of the institutionalized spouse is made available to (or for the benefit of) the community spouse.

(Emphasis added.) The community spouse monthly income allowance (CSMIA) is defined as the amount by which a community spouse's income is insufficient to meet the MMMNA. *See* § 1396r-5(d)(2). Stated another way, § 1396r-5(d) directs the institutionalized spouse to transfer income to the community spouse if the community spouse's income falls short of the MMMNA and relief for the community spouse was not available by permitting an increase in the CSRA because there were insufficient resources to generate the needed income.

¶22 The transfer referenced in 42 U.S.C. § 1396r-5(d)(1), however, occurs *after* the institutionalized spouse has been determined eligible for MA. *See* § 1396r-5(d)(1). And as stated earlier, this transfer of income is unrelated to revising the CSRA, which occurs *prior* to a determination of eligibility. Because § 1396r-5(d) (relating to transferring income) is limited to post-eligibility determination transfers, while increasing the CSRA pursuant to § 1396r-5(e)(2)(C) is not so limited, then increasing the CSRA via resources is the only method by which a community spouse can be afforded more income for the MMMNA at the time MA eligibility is being determined for the institutionalized spouse. *See* ***Gruber***, 647 N.E.2d at 868-69 ("Since the MMMNA must be met, and since Section 1396r-5(e)(2)(C) provides the only method to meet the MMMNA, the agency has no choice but to transfer over the amount of resources that is necessary to raise [the community spouse's] income level to meet the MMMNA").

¶23 Furthermore, DHFS's contention that the community spouse's income includes imputed income from the institutionalized spouse would require us to conclude that while Congress so clearly provided for the transfer of income from an institutionalized spouse to a community spouse after a determination of eligibility, it also meant to do so prior to a determination of eligibility simply by using the phrase, "community spouse's income." Such a reading is inconsistent with the care with which Congress specified whose income or resources were addressed in the other subsections of the statute. Additionally, in many instances, DHFS's interpretation would make 42 U.S.C. § 1396r-5(d)(1) superfluous because all possible transfers of income available to meet the community spouse's MMMNA would have occurred prior to a determination of eligibility and there would be nothing left to transfer after eligibility, the period of time specifically referenced in (d)(1). Therefore, we conclude that construing the term, "community spouse's income," to include a pre-eligibility transfer of income from

the institutionalized spouse is contrary to the plain meaning of § 1396r-5(e)(2)(C). We also conclude that subsection 5(d)(1) provides for a shifting of income to the community spouse after eligibility has been determined when, even though all of the couple's assets have been transferred to the community spouse, that spouse still does not have sufficient income-generating capacity to reach the MMMNA.[5]

¶24 Finally, the transfer of the couple's resources such that the community spouse's income will meet the MMMNA is consistent with the objectives of the spousal impoverishment provisions of the Act, *i.e.*, to assure that the community spouse will have income and resources sufficient to live independently of the institutionalized spouse, without other forms of public assistance, if it is possible to do so. However, under the income-first approach requested by DHFS, a community spouse, like the one in this case, would become dependent upon income from the institutionalized spouse in order to meet his or her minimum monthly needs. Because that community spouse would be receiving income from the institutionalized spouse, more of the couple's resources would be spent down on the cost of nursing home care. However, if the institutionalized spouse dies first, the income that the community spouse receives from the institutionalized spouse would cease. Thereafter, the community spouse would be left with income that is, by default, less than the MMMNA set by federal statute (because otherwise, the institutionalized spouse would not have transferred income to the community spouse). In short, once the institutionalized spouse dies, under the income-first

[5] That type of situation is likely to occur when a homemaker who has not worked outside of the home becomes a community spouse, thereby having very little income in his or her name alone, and as a couple, there are few assets. In order to avoid impoverishment, such a spouse then may require a transfer of both resources and income from the institutionalized spouse in order to meet the community spouse's MMMNA.

rule, a community spouse will be left impoverished, without either the assets or the income necessary to assure independence.

¶25 However, under the resource-first rule, a community spouse may receive more of the couple's income-generating assets. Thereafter, if the institutionalized spouse dies, the community spouse continues to have resources to use for self-support. This furthers the purpose behind the spousal impoverishment provisions of the MCCA--to allow the community spouse to live independently. Congress knew that to take all of the community spouse's assets to pay for the institutionalized spouse's nursing home care would be short-sighted, because the community spouse would need to turn to other public assistance programs to survive once the institutionalized spouse died. And, reliance on public assistance by the community spouse had been a result of spousal impoverishment, which the MCCA sought to change.

¶26 We are also unpersuaded by other arguments made by DHFS. For example, DHFS urges us to consider the legislative history of the spousal impoverishment provisions because it believes that the legislative history supports an income-first approach. However, we do not look at the legislative history of a statute unless we conclude that it is ambiguous. *See* ***J.A.L.***, 162 Wis. 2d at 962, 471 N.W.2d at 502. Additionally, as stated above, legislative history may not be used to create an ambiguity in otherwise plain statutory language. *See* ***Johnson***, 195 Wis. 2d at 383, 536 N.W.2d at 170.[6] Because we conclude the statute is unambiguous, we cannot examine the legislative history.

[6] Additionally, we note that opponents of the income-first rule point to the same legislative history for support of their claim that a resource-first approach is mandated. The legislative history is, at best, inconclusive.

¶27 Similarly, DHFS also asks us to consider several letters from the United States Department of Health and Human Services (DHHS), the federal agency charged with administering the Medicaid program. However, we do not look to other sources to interpret a statute if its language is clear on its face. Additionally, we note that DHHS has not interpreted the statute consistently.

¶28 Finally, DHFS argues that while one of the chief purposes of the MCCA was to end spousal impoverishment, another purpose was to limit the use of public funds to support the institutionalized care of those who could afford to pay for their health care. DHFS contends that a resource-first rule allows couples to shelter excessive amounts of assets. However, this argument ignores 42 U.S.C. § 1396r-5(e)(2)(C) which places a ceiling on the amount of resources a hearing officer can transfer to the CSRA. The examiner may transfer no more than the amount of resources necessary to provide the community spouse with a MMMNA, which is set at 150% of the federal poverty line. *See* § 1396r-5(d)(3). The transfer of resources before income does not permit a community spouse to live a lavish lifestyle while the government pays for his or her spouse's nursing home care.

CONCLUSION

¶29 Because we conclude that Wisconsin's income-first rule set out in WIS. STAT. § 49.455(8)(d) impermissibly conflicts with federal law, we reverse the order of the circuit court and direct it to remand this matter to DHFS to increase Burnett's CSRA to an amount, when combined with Burnett's other income, which will permit him to have an income-generating capacity sufficient to meet the MMMNA.

By the Court.—Order reversed and cause remanded with directions for further proceedings consistent with this opinion.

Recommended for publication in the official reports.

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To: September 12, 2000

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You are hereby notified that the Court has entered the following order:

No. 99-1053 *Blumer v. Wis. DHFS* L.C.#97CV141

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of respondent-respondent-petitioner, Wisconsin Department of Health and Family Services, and considered by the court,

IT IS ORDERED that the petition for review is denied, without costs.

Cornelia G. Clark
Clerk of Supreme Court

STATE OF WISCONSIN GREEN COUNTY
CIRCUIT COURT

IRENE BLUMER,

Petitioner,

Case No. 97-CV-0141

v.

WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES,

Respondent.

JUDGMENT

The above action having come on for hearing before the court, petitioner, Irene Blumer, having appeared by the Elder Law Center of the Coalition of Wisconsin Aging Groups by Mitchell Hagopian; and respondent, Wisconsin Department of Health and Family Services, having appeared by James E. Doyle, Attorney General, and Leonard Martin, Assistant Attorney General; and the court having considered the matter upon the record and the written and oral arguments of the parties, and having on the 11th day of November 1998 orally issued its decision, now, on motion,

IT IS ORDERED AND ADJUDGED that for the reasons set forth in the court's oral ruling of November 11, 1998, the orders of the Wisconsin Department of Health and Family Services, dated June 10 and July 12, 1997 ultimately

concluding that Irene Blumer was ineligible for medical assistance due to excess assets be, and the same hereby are, in all respects affirmed.

Dated this 15th day of February 1999.

By the Court:

/s/
James R. Beer
Circuit Judge

THE COURT: I'm assuming you're ready for a decision.

MR. HAGOPIAN: Yes, your Honor.

MR. MARTIN: Yes, your Honor.

THE COURT: The Court would first state it is not difficult to be sympathetic to Ms. Blumer in this matter. And I think both counsel have written excellent briefs and argued well their points.

This becomes a decision basically down to whether or not the State of Wisconsin in drafting its statutes actually violated the federal statutes creating a program.

We haven't entered into whether or not the prior hearing examiner, anyway in argument, had any deficiencies in his findings from not taking sufficient evidence or anything such as that. That is not involved here.

We have such a small amount of increase, that I can't help but be troubled about that. It's clear that the Wisconsin statutes require that the institutionalized spouse make available to the impoverished spouse their income.

You can look at this several ways, and there are certainly times when those amounts far exceed the needs for care and times when they don't exceed the need for care but that a standard had to be set by the State of Wisconsin.

Now, is that standard that they set in conflict in any way with not only the statutes themselves but the intent of the statutes?

And as to that, I am not convinced from what I have read and seen and been provided for the Court to find differently because it's clear, as stated on page 12 of

Mr. Martin's brief, "that the language of the federal statute is not clear enough or unambiguous enough to conclude that there is any absolute prohibition at work in this matter."

Therefore, I think that the only remedy that this Court has is to uphold the finding of the hearing examiner and deny petitioner's request.

Mr. Martin, you will draft an order, submit it on to counsel, and I'll sign the same.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

In the Matter of

Irene G. Blumer
c/o Attorney Scott Thompson
P.O. Box 53566
Monroe, WI 53566

DECISION

MED-23/12842

PRELIMINARY RECITALS

Pursuant to a petition filed February 20, 1997, under sec. 49.45(5), Wis. Stats., to review a decision by the Green County Dept. of Human Services to deny an application for Medical Assistance (MA), a hearing was held on April 29, 1997, at Monroe, Wisconsin. A hearing set for March 18, 1997 was rescheduled at the petitioner's request.

The issue for determination is whether the petitioner is eligible for MA due to excess assets.

There appeared at that time and place the following persons:

PARTIES IN INTEREST: Petitioner:
Irene G. Blumer
c/o Attorney Scott Thompson
P.O. Box 53566
Monroe, WI 53566
By: Attorney Scott Thompson

Wisconsin Department of Health and Family Services
Bureau of Welfare Initiatives
1 W. Wilson St., Room 350
P.O. Box 7851
Madison, WI 53707-7851
By: David Lousy, ESS1
Green County Dept. of Human Services
Pleasant View Annex,
P.O. Box 216
Monroe, WI 53566

EXAMINER: Kenneth P. Adler, Attorney
Division of Hearings & Appeals

FINDINGS OF FACT

1. The petitioner (SSN 387-36-0075; CARES No. 5105303954) is a married resident of Green County. She was admitted to a nursing home on November 17, 1994.

2. On December 31, 1996 the petitioner, through her husband, Burnett Blumer, applied for institutional Medical Assistance (MA) benefits.

3. Following application, an asset assessment was completed to determine what assets the couple had at the time of the petitioner's admission to the nursing home. The asset assessment, completed in January, 1997, indicated the petitioner and her spouse had total countable assets of $145,644 in November 17, 1994.

4. The community spouse asset share (CSAS) was computed at $72,822 with the total asset limit established at $74,822.

5. During January and February the couple's total countable assets remained above the $74,822 asset limit. On February 11, 1997 the couple's total countable assets were $89,335.30 (CSAS = $87,335.30; petitioner's share - $2,000) - or $14,513.30 above the asset limit. Exhibit 1

6. On February 12, 1997 the Client Assistance for Reemployment and Economic Support (CARES) system issued a notice of decision stating institutional MA had been denied effective 03/01/97 as "countable assets exceed limits." There was no discussion of the total combined assets of the couple, the maximum total assets the couple could retain, nor the amount by which that limit was exceeded. Exhibit 2

7. The petitioner has the following income:

Social Security		$ 926.99
Pension		$ 335.72
Less:	Medicare Insurance ($60)	
	Personal Allowance ($40)	
		$1,162.71

The community spouse has the following income:

Social Security	$1,015.15
New York Life Annuity	$ 309.45
Dividends/Interest	$ 377.85
	$1,702.45

* Dividends/Interest

New York Life Annuities . .	$214.05	
Checking NOW Account. . .	$ 7.05	
First Federal C.D.	$ 42.44	
First Banking Center C.D. .	$ 26.53	
Main Stay	$ 87.78	$ 377.85*

DISCUSSION

The issue in this case concerns the MA eligibility of the petitioner based upon spousal impoverishment guidelines concerning both: **(1)** a couple's "asset allowance" determined using the Community Spouse Asset Share (CSAS) and **(2)** allowable monthly income determined by the "minimum monthly maintenance needs allowance". The question is whether an institutionalized individual initially determined ineligible for MA based upon assets exceeding the spousal impoverishment asset allowance may subsequently be found eligible through the fair hearing process if those assets are required to generate income for a community spouse to reach the minimum monthly needs allowance as established by statute.

The petitioners applied for MA in December, 1996. At that time the county agency correctly completed an asset assessment of the couple's assets at the time the petitioner was institutionalized in November, 1994. After determining the couple had approximately $145,644 in assets during November, 1994 the county agency calculated an asset allowance of $72,822. A review of eligibility during January, 1997 indicated the couple remained above that asset allowance, with $88,670 in assets - still $15,848 above the asset allowance determined by the county agency. Therefore, the county continued to deny the application.

Technically the county correctly processed the application. However, the petitioners appealed the asset

allowance determination, arguing the allowance did not correctly reflect the assets available, and even if it did, the monthly income received by Mr. Blumer was not at the level of the minimum monthly maintenance needs allowance. The petitioners explained the assets, though exceeding the asset allowance, are generating a reasonable rate of interest and should be allowed to continue to do so in order to provide monthly income. Therefore the petitioners requested the amount of assets allowed to be retained by the community spouse be increased above the asset allowance to allow Mr. Blumer to retain the assets in order to generate income to raise his monthly income amount to the minimum monthly maintenance needs allowance of $1,727.

I. LEGAL BACKGROUND

The federal Medicare Catastrophic Coverage Act of 1988 (MCAA) included extensive changes in state Medicaid (MA) eligibility determinations related to spousal impoverishment. In such cases the institutionalized spouse resides in a nursing facility and "community spouse" refers to the person married to the institutionalized individual. Sec. 49.455(1), Wis. Stats. As a general rule, no income of a spouse is considered to be available for use by the other spouse during any month in which that other spouse is an institutionalized spouse. Sec. 49.455(3), Wis. Stats.

The MCAA also established a new "minimum monthly needs allowance" for the community spouse at a specified percentage of the federal poverty line. This amount is simply the amount of income considered necessary to maintain the community spouse in the community. A community spouse may, however, prove through the fair hearing process that he or she has financial need above the "minimum monthly needs allowance" based upon exceptional circumstances resulting in financial duress. Sec. 49.455, Wis. Stats.

II. MA HANDBOOK PROVISIONS

When initially determining whether an institutionalized spouse is eligible for MA, county agencies are instructed to review the combined assets of the institutionalized spouse and the community spouse. *MA Handbook*, Appendix 23.4.1. All available assets owned by the couple are to be considered. Homestead property, one vehicle, and anything set aside for burial is exempt from the determination. The couple's total assets are then compared to the "community spouse asset share", or asset limit, to determine eligibility.

MA Handbook, Appendix 23.4.1., explains the eligibility determination process: First, a Community Spouse Asset Share (CSAS) is calculated as follows: **(1)** If the couple's total countable assets are $153,480 or more, the Community Spouse Asset Share (CSAS) is $79,020; **(2)** If the couple's total countable assets are less that $153,480 but greater than $100,000, the CSAS is 1/2 of the total countable assets of the couple; and **(3)** if the total countable assets of the couple are $100,000 or less, the CSAS is $50,000. Sec. 49.455(6)(b)3, Wis. Stats. *MA Handbook*, Appendix 23.4.2.

Second, $2,000 (the MA asset limit for the institutionalized individual) is then added to the CSAS to determine the asset allowance. As a general rule, if the couple's assets are at or below the determined asset allowance, the institutionalized spouse is eligible for MA. If the assets exceed the above amount, the spouse is not MA eligible.

As an exception to this general rule, the asset allowance may be increased, through the fair hearing process, if income-producing assets exceeding the asset allowance are necessary to raise the community spouse's income to the minimum monthly needs allowance. The minimum monthly maintenance needs allowance is currently defined as the *lesser* of $1,975.50 or $1,727 plus excess shelter costs. *MA Handbook*, Appendix 23.6.0.

III. STATE STATUTES PROVISIONS

Sec. 49.455(6)(b)3, Wis. Stats. states as follows:

> **(6) Permitting transfer of resources to community spouse. (a)** Notwithstanding s. 49.453(2), an institutionalized spouse may transfer an amount of resources equal to the community spouse resource allowance determined under par. (b) to, or for the sole benefit of, the community spouse without becoming ineligible for medical assistance for the period of ineligibility under s. 49.453(3) as a result of the transfer. The institutionalized spouse shall make the transfer as soon as practicable **after the initial determination of eligibility for medical assistance**, . . .
>
> **(b)** The community spouse resource allowance equals the amount by which the amount of resources otherwise available to the community spouse is exceeded by the greatest of the following: . . .
>
> **3.** The amount established in a fair hearing under sub. (8)(d).

Subsection (8)(d) provides as follows:

> If either spouse establishes at a fair hearing that the community spouse resource allowance determined under sub. (6)(b) without a fair hearing does not generate enough income to raise the community spouse's income to the minimum monthly maintenance needs allowance under sub. (4)(c), the department

> shall establish an amount to be used under sub. (6)(b)3 that results in a community spouse resource allowance that generates enough income to raise the community spouse's income to the minimum monthly maintenance needs allowance under sub. (4)(c). **Except in exceptional cases which would result in financial duress for the community spouse,** ***the department may not establish an amount to be used under (6)(b)3 unless the institutionalized spouse makes available to the community spouse the maximum monthly income allowance permitted under sub. (4)(b)*** . . . (Emphasis added.)

Sub. (4)(b) defines the minimum monthly maintenance needs allowance, which in this particular case is $1,727.00.

Based upon the above, a hearing examiner is allowed to bypass the asset allowance limit by determining assets in excess of the allowance are necessary to generate income up to the minimum monthly maintenance needs income allowance for the community spouse. Therefore, the above provision has been interpreted to allow a hearing examiner to determine an applicant eligible for MA even if a spousal impoverishment application was initially denied based upon the fact the combined assets of the couple exceeded the asset allowance. See MED-62/94792, MED-36/93977.

However, in this particular case I must conclude I do not have the authority to order assets retained exceeding the asset allowance based upon the assertion the community spouse requires those assets to raise his monthly income to the minimum monthly maintenance needs allowance. The reason is the institutionalized spouse has monthly income of $1,262.71, which, combined with the community spouse's monthly income of $1,702.45 equals $2,965.16. In most

cases, spouses **combined** income does not rise to the minimum monthly maintenance needs allowance.

The *MA Handbook* provisions cited above are directives to the county economic support workers who are responsible for the initial processing of MA applications. Once a county worker has denied an application due to excess assets, the state statutes grant jurisdiction to a fair hearing officer to review the matter and allow an increase in assets in certain circumstances. As I read the underlined portion of sub. (8)(d) referenced above, the institutionalized spouse must make available to the community spouse the amount necessary to raise the community spouse income to the monthly needs allowance **prior to the resource allocation request**. Therefore, a resource allowance via a fair hearing under (6)(b)3 is only an option if the institutionalized spouse transfers all available income (less the relevant allowances) to the community spouse, and the community spouse's income remains below the minimum monthly maintenance needs allowance.

As the state statutes are the controlling legal authority in this particular case, I must follow the directives of sec. 49.455(8)(d) in determining the petitioner must first make her income available to the community spouse. As the couple's total monthly income exceeds $2,400 **even without the asset income listed in Finding of Fact #7**, it appears upon allocation of the institutionalized spouse's income no assets would need be retained to generate income for the community spouse.

CONCLUSIONS OF LAW

1. That I do not have jurisdiction to allow the community spouse to retain assets above the asset allowance because the petitioner has not made any of her income available to the community spouse.

2. That the county correctly denied the MA application as the community spouse has assets in excess of the asset allowance.

NOW, THEREFORE, it is

ORDERED

That the petition for review herein be and the same is hereby dismissed.

REQUEST FOR A REHEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision. To ask for a new hearing, send a written request to Division of Hearings and Appeals, P. O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the examiner made and why it is important. Or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be *received no later than 20 days* after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in § 227.49 of the state statutes. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one). The appeal must be served on the Department of Health and Family Services, P.O. Box 7850, Madison, WI 53707-7850.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in § 227.53 of the statutes.

Given under my hand at the City of Madison, Wisconsin, this 10th day of June, 1997.

/s/
Kenneth P. Adler, Attorney
DIVISION OF HEARINGS AND APPEALS
5/24/97kpa

cc: Petitioner
Green County
Attorney Scott Thompson

42 U.S.C. § 1396r-5 (1994)

§ 1396r-5. Treatment of income and resources for certain institutionalized spouses

(a) Special treatment for institutionalized spouses

(1) Supersedes other provisions

In determining the eligibility for medical assistance of an institutionalized spouse (as defined in subsection (h)(1) of this section), the provisions of this section supersede any other provision of this subchapter (including sections 1396a(a)(17) and 1396a(f) of this title) which is inconsistent with them.

(2) No comparable treatment required

Any different treatment provided under this section for institutionalized spouses shall not, by reason of paragraph (10) or (17) of section 1396a(a) of this title, require such treatment for other individuals.

(3) Does not affect certain determinations

Except as this section specifically provides, this section does not apply to--

(A) the determination of what constitutes income or resources, or

(B) the methodology and standards for determining and evaluating income and resources.

(4) Application in certain States and territories

(A) Application in States operating under demonstration projects

In the case of any State which is providing medical assistance to its residents under a waiver granted under section 1315 of this title, the Secretary shall require the State to meet the requirements of this section in the same manner as the State would be required to meet such requirement if the State had in effect a plan approved under this subchapter.

(B) No application in commonwealths and territories

This section shall only apply to a State that is one of the 50 States or the District of Columbia.

(5) Application to individuals receiving services from organizations receiving certain waivers

This section applies to individuals receiving institutional or noninstitutional services from any organization receiving a frail elderly demonstration project waiver under section 9412(b) of the Omnibus Budget Reconciliation Act of 1986 or a waiver under section 603(c) of the Social Security Amendments of 1983.

(b) Rules for treatment of income

(1) Separate treatment of income

During any month in which an institutionalized spouse is in the institution, except as provided in

paragraph (2), no income of the community spouse shall be deemed available to the institutionalized spouse.

(2) Attribution of income

In determining the income of an institutionalized spouse or community spouse for purposes of the post-eligibility income determination described in subsection (d) of this section, except as otherwise provided in this section and regardless of any State laws relating to community property or the division of marital property, the following rules apply:

(A) Non-trust property

Subject to subparagraphs (C) and (D), in the case of income not from a trust, unless the instrument providing the income otherwise specifically provides--

(i) if payment of income is made solely in the name of the institutionalized spouse or the community spouse, the income shall be considered available only to that respective spouse;

(ii) if payment of income is made in the names of the institutionalized spouse and the community spouse, one-half of the income shall be considered available to each of them; and

(iii) if payment of income is made in the names of the institutionalized spouse or the community spouse, or both, and to another person or persons, the income shall be considered available to each spouse in proportion to the spouse's interest (or, if payment is made with respect to both spouses and no such interest is

specified, one-half of the joint interest shall be considered available to each spouse).

(B) Trust property

In the case of a trust--

(i) except as provided in clause (ii), income shall be attributed in accordance with the provisions of this subchapter (including sections 1396a(a)(17) and 1396p(d) of this title), and

(ii) income shall be considered available to each spouse as provided in the trust, or, in the absence of a specific provision in the trust--

(I) if payment of income is made solely to the institutionalized spouse or the community spouse, the income shall be considered available only to that respective spouse;

(II) if payment of income is made to both the institutionalized spouse and the community spouse, one-half of the income shall be considered available to each of them; and

(III) if payment of income is made to the institutionalized spouse or the community spouse, or both, and to another person or persons, the income shall be considered available to each spouse in proportion to the spouse's interest (or, if payment is made with respect to both spouses and no such interest is specified, one-half of the joint interest shall be considered available to each spouse).

(C) Property with no instrument

In the case of income not from a trust in which there is no instrument establishing ownership, subject to subparagraph (D), one-half of the income shall be considered to be available to the institutionalized spouse and one- half to the community spouse.

(D) Rebutting ownership

The rules of subparagraphs (A) and (C) are superseded to the extent that an institutionalized spouse can establish, by a preponderance of the evidence, that the ownership interests in income are other than as provided under such subparagraphs.

(c) Rules for treatment of resources

(1) Computation of spousal share at time of institutionalization

(A) Total joint resources

There shall be computed (as of the beginning of the first continuous period of institutionalization (beginning on or after September 30, 1989) of the institutionalized spouse)--

(i) the total value of the resources to the extent either the institutionalized spouse or the community spouse has an ownership interest, and

(ii) a spousal share which is equal to 1/2 of such total value.

(B) Assessment

At the request of an institutionalized spouse or community spouse, at the beginning of the first continuous period of institutionalization (beginning on or after September 30, 1989) of the institutionalized spouse and upon the receipt of relevant documentation of resources, the State shall promptly assess and document the total value described in subparagraph (A)(i) and shall provide a copy of such assessment and documentation to each spouse and shall retain a copy of the assessment for use under this section. If the request is not part of an application for medical assistance under this subchapter, the State may, at its option as a condition of providing the assessment, require payment of a fee not exceeding the reasonable expenses of providing and documenting the assessment. At the time of providing the copy of the assessment, the State shall include a notice indicating that the spouse will have a right to a fair hearing under subsection (e)(2) of this section.

(2) Attribution of resources at time of initial eligibility determination

In determining the resources of an institutionalized spouse at the time of application for benefits under this subchapter, regardless of any State laws relating to community property or the division of marital property--

(A) except as provided in subparagraph (B), all the resources held by either the institutionalized spouse, community spouse, or both, shall be considered to be available to the institutionalized spouse, and

(B) resources shall be considered to be available to an institutionalized spouse, but only to the extent that the amount of such resources exceeds the amount computed under subsection (f)(2)(A) of this section (as of the time of application for benefits).

(3) Assignment of support rights

The institutionalized spouse shall not be ineligible by reason of resources determined under paragraph (2) to be available for the cost of care where--

(A) the institutionalized spouse has assigned to the State any rights to support from the community spouse;

(B) the institutionalized spouse lacks the ability to execute an assignment due to physical or mental impairment but the State has the right to bring a support proceeding against a community spouse without such assignment; or

(C) the State determines that denial of eligibility would work an undue hardship.

(4) Separate treatment of resources after eligibility for benefits established

During the continuous period in which an institutionalized spouse is in an institution and after the month in which an institutionalized spouse is determined to be eligible for benefits under this subchapter, no resources of the community spouse shall be deemed available to the institutionalized spouse.

(5) Resources defined

In this section, the term "resources" does not include--

(A) resources excluded under subsection (a) or (d) of section 1382b of this title, and

(B) resources that would be excluded under section 1382b(a)(2)(A) of this title but for the limitation on total value described in such section.

(d) Protecting income for community spouse

(1) Allowances to be offset from income of institutionalized spouse

After an institutionalized spouse is determined or redetermined to be eligible for medical assistance, in determining the amount of the spouse's income that is to be applied monthly to payment for the costs of care in the institution, there shall be deducted from the spouse's monthly income the following amounts in the following order:

(A) A personal needs allowance (described in section 1396a(q)(1) of this title), in an amount not less than the amount specified in section 1396a(q)(2) of this title.

(B) A community spouse monthly income allowance (as defined in paragraph (2)), but only to the extent income of the institutionalized spouse is made available to (or for the benefit of) the community spouse.

(C) A family allowance, for each family member, equal to at least 1/3 of the amount by which the

amount described in paragraph (3)(A)(i) exceeds the amount of the monthly income of that family member.

(D) Amounts for incurred expenses for medical or remedial care for the institutionalized spouse (as provided under section 1396a(r) of this title).

In subparagraph (C), the term "family member" only includes minor or dependent children, dependent parents, or dependent siblings of the institutionalized or community spouse who are residing with the community spouse.

(2) Community spouse monthly income allowance defined

In this section (except as provided in paragraph (5)), the "community spouse monthly income allowance" for a community spouse is an amount by which--

(A) except as provided in subsection (e) of this section, the minimum monthly maintenance needs allowance (established under and in accordance with paragraph (3)) for the spouse, exceeds

(B) the amount of monthly income otherwise available to the community spouse (determined without regard to such an allowance).

(3) Establishment of minimum monthly maintenance needs allowance

(A) In general

Each State shall establish a minimum monthly maintenance needs allowance for each community

spouse which, subject to subparagraph (C), is equal to or exceeds--

(i) the applicable percent (described in subparagraph (B)) of 1/12 of the income official poverty line (defined by the Office of Management and Budget and revised annually in accordance with section 9902(2) of this title) for a family unit of 2 members; plus

(ii) an excess shelter allowance (as defined in paragraph (4)).

A revision of the official poverty line referred to in clause (i) shall apply to medical assistance furnished during and after the second calendar quarter that begins after the date of publication of the revision.

(B) Applicable percent

For purposes of subparagraph (A)(i), the "applicable percent" described in this paragraph, effective as of--

(i) September 30, 1989, is 122 percent,

(ii) July 1, 1991, is 133 percent, and

(iii) July 1, 1992, is 150 percent.

(C) Cap on minimum monthly maintenance needs allowance

The minimum monthly maintenance needs allowance established under subparagraph (A) may not exceed $1,500 (subject to adjustment under subsections (e) and (g) of this section).

(4) Excess shelter allowance defined

In paragraph (3)(A)(ii), the term "excess shelter allowance" means, for a community spouse, the amount by which the sum of--

(A) the spouse's expenses for rent or mortgage payment (including principal and interest), taxes and insurance and, in the case of a condominium or cooperative, required maintenance charge, for the community spouse's principal residence, and

(B) the standard utility allowance (used by the State under section 2014(e) of title 7) or, if the State does not use such an allowance, the spouse's actual utility expenses,

exceeds 30 percent of the amount described in paragraph (3)(A)(i), except that, in the case of a condominium or cooperative, for which a maintenance charge is included under subparagraph (A), any allowance under subparagraph (B) shall be reduced to the extent the maintenance charge includes utility expenses.

(5) Court ordered support

If a court has entered an order against an institutionalized spouse for monthly income for the support of the community spouse, the community spouse monthly income allowance for the spouse shall be not less than the amount of the monthly income so ordered.

(e) Notice and fair hearing

(1) Notice

Upon--

(A) a determination of eligibility for medical assistance of an institutionalized spouse, or

(B) a request by either the institutionalized spouse, or the community spouse, or a representative acting on behalf of either spouse,

each State shall notify both spouses (in the case described in subparagraph (A)) or the spouse making the request (in the case described in subparagraph (B)) of the amount of the community spouse monthly income allowance (described in subsection (d)(1)(B) of this section), of the amount of any family allowances (described in subsection (d)(1)(C) of this section), of the method for computing the amount of the community spouse resources allowance permitted under subsection (f) of this section, and of the spouse's right to a fair hearing under this subsection respecting ownership or availability of income or resources, and the determination of the community spouse monthly income or resource allowance.

(2) Fair hearing

(A) In general

If either the institutionalized spouse or the community spouse is dissatisfied with a determination of--

(i) the community spouse monthly income allowance;

(ii) the amount of monthly income otherwise available to the community spouse (as applied under subsection (d)(2)(B) of this section);

(iii) the computation of the spousal share of resources under subsection (c)(1) of this section;

(iv) the attribution of resources under subsection (c)(2) of this section; or

(v) the determination of the community spouse resource allowance (as defined in subsection (f)(2) of this section);

such spouse is entitled to a fair hearing described in section 1396a(a)(3) of this title with respect to such determination if an application for benefits under this subchapter has been made on behalf of the institutionalized spouse. Any such hearing respecting the determination of the community spouse resource allowance shall be held within 30 days of the date of the request for the hearing.

(B) Revision of minimum monthly maintenance needs allowance

If either such spouse establishes that the community spouse needs income, above the level otherwise provided by the minimum monthly maintenance needs allowance, due to exceptional circumstances resulting in significant financial duress, there shall be substituted, for the minimum monthly maintenance needs allowance in subsection (d)(2)(A) of this section, an amount

adequate to provide such additional income as is necessary.

(C) Revision of community spouse resource allowance

If either such spouse establishes that the community spouse resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, there shall be substituted, for the community spouse resource allowance under subsection (f)(2) of this section, an amount adequate to provide such a minimum monthly maintenance needs allowance.

(f) Permitting transfer of resources to community spouse

(1) In general

An institutionalized spouse may, without regard to section 1396p(c)(1) of this title, transfer an amount equal to the community spouse resource allowance (as defined in paragraph (2)), but only to the extent the resources of the institutionalized spouse are transferred to (or for the sole benefit of) the community spouse. The transfer under the preceding sentence shall be made as soon as practicable after the date of the initial determination of eligibility, taking into account such time as may be necessary to obtain a court order under paragraph (3).

(2) Community spouse resource allowance defined

In paragraph (1), the "community spouse resource allowance" for a community spouse is an amount (if any) by which--

(A) the greatest of--

(i) $12,000 (subject to adjustment under subsection (g) of this section), or, if greater (but not to exceed the amount specified in clause (ii)(II)) an amount specified under the State plan,

(ii) the lesser of (I) the spousal share computed under subsection (c)(1) of this section, or (II) $60,000 (subject to adjustment under subsection (g) of this section),

(iii) the amount established under subsection (e)(2) of this section; or

(iv) the amount transferred under a court order under paragraph (3);

exceeds

(B) the amount of the resources otherwise available to the community spouse (determined without regard to such an allowance).

(3) Transfers under court orders

If a court has entered an order against an institutionalized spouse for the support of the community spouse, section 1396p of this title shall not apply to amounts of resources transferred pursuant to such order for the support of the spouse or a family member (as defined in subsection (d)(1) of this section).

(g) Indexing dollar amounts

For services furnished during a calendar year after 1989, the dollar amounts specified in subsections (d)(3)(C), (f)(2)(A)(i), and (f)(2)(A)(ii)(II) of this section shall be increased by the same percentage as the percentage increase in the consumer price index for all urban consumers (all items; U.S. city average) between September 1988 and the September before the calendar year involved.

(h) Definitions

In this section:

(1) The term "institutionalized spouse" means an individual who--

(A) is in a medical institution or nursing facility or who (at the option of the State) is described in section 1396a(a)(10)(A)(ii)(VI) of this title, and

(B) is married to a spouse who is not in a medical institution or nursing facility;

but does not include any such individual who is not likely to meet the requirements of subparagraph (A) for at least 30 consecutive days.

(2) The term "community spouse" means the spouse of an institutionalized spouse.

42 U.S.C.A. § 1396r-5 (1999 Supp., showing post 1993 amendments)

§ 1396r-5. Treatment of income and resources for certain institutionalized spouses

(a) Special treatment for institutionalized spouses

(1) Supersedes other provisions

In determining the eligibility for medical assistance of an institutionalized spouse (as defined in subsection (h)(1) of this section), the provisions of this section supersede any other provision of this subchapter (including sections 1396a(a)(17) and 1396a(f) of this title) which is inconsistent with them.

(2) No comparable treatment required

Any different treatment provided under this section for institutionalized spouses shall not, by reason of paragraph (10) or (17) of section 1396a(a) of this title, require such treatment for other individuals.

(3) Does not affect certain determinations

Except as this section specifically provides, this section does not apply to--

(A) the determination of what constitutes income or resources, or

(B) the methodology and standards for determining and evaluating income and resources.

(4) Application in certain States and territories

(A) Application in States operating under demonstration projects

In the case of any State which is providing medical assistance to its residents under a waiver granted under section 1315 of this title, the Secretary shall require the State to meet the requirements of this section in the same manner as the State would be required to meet such requirement if the State had in effect a plan approved under this subchapter.

(B) No application in commonwealths and territories

This section shall only apply to a State that is one of the 50 States or the District of Columbia.

(5) Application to individuals receiving services under PACE programs

This section applies to individuals receiving institutional or noninstitutional services under a PACE demonstration waiver program (as defined in section 1396u-4(a)(7) of this title) or under a PACE program under section 1936u-4 or 1395eee of this title.

(b) Rules for treatment of income

(1) Separate treatment of income

During any month in which an institutionalized spouse is in the institution, except as provided in paragraph (2), no income of the community spouse shall be deemed available to the institutionalized spouse.

(2) Attribution of income

In determining the income of an institutionalized spouse or community spouse for purposes of the post-eligibility income determination described in subsection (d) of this section, except as otherwise provided in this section and regardless of any State laws relating to community property or the division of marital property, the following rules apply:

(A) Non-trust property

Subject to subparagraphs (C) and (D), in the case of income not from a trust, unless the instrument providing the income otherwise specifically provides--

(i) if payment of income is made solely in the name of the institutionalized spouse or the community spouse, the income shall be considered available only to that respective spouse;

(ii) if payment of income is made in the names of the institutionalized spouse and the community spouse, one-half of the income shall be considered available to each of them; and

(iii) if payment of income is made in the names of the institutionalized spouse or the community spouse, or both, and to another person or persons, the income shall be considered available to each spouse in proportion to the spouse's interest (or, if payment is made with respect to both spouses and no such interest is specified, one-half of

the joint interest shall be considered available to each spouse).

(B) Trust property

In the case of a trust--

(i) except as provided in clause (ii), income shall be attributed in accordance with the provisions of this subchapter (including sections 1396a(a)(17) and 1396p(d) of this title), and

(ii) income shall be considered available to each spouse as provided in the trust, or, in the absence of a specific provision in the trust--

(I) if payment of income is made solely to the institutionalized spouse or the community spouse, the income shall be considered available only to that respective spouse;

(II) if payment of income is made to both the institutionalized spouse and the community spouse, one-half of the income shall be considered available to each of them; and

(III) if payment of income is made to the institutionalized spouse or the community spouse, or both, and to another person or persons, the income shall be considered available to each spouse in proportion to the spouse's interest (or, if payment is made with respect to both spouses and no such interest is specified,

one-half of the joint interest shall be considered available to each spouse).

(C) Property with no instrument

In the case of income not from a trust in which there is no instrument establishing ownership, subject to subparagraph (D), one-half of the income shall be considered to be available to the institutionalized spouse and one-half to the community spouse.

(D) Rebutting ownership

The rules of subparagraphs (A) and (C) are superseded to the extent that an institutionalized spouse can establish, by a preponderance of the evidence, that the ownership interests in income are other than as provided under such subparagraphs.

(c) Rules for treatment of resources

(1) Computation of spousal share at time of institutionalization

(A) Total joint resources

There shall be computed (as of the beginning of the first continuous period of institutionalization (beginning on or after September 30, 1989) of the institutionalized spouse)--

(i) the total value of the resources to the extent either the institutionalized spouse or the community spouse has an ownership interest, and

(ii) a spousal share which is equal to 1/2 of such total value.

(B) Assessment

At the request of an institutionalized spouse or community spouse, at the beginning of the first continuous period of institutionalization (beginning on or after September 30, 1989) of the institutionalized spouse and upon the receipt of relevant documentation of resources, the State shall promptly assess and document the total value described in subparagraph (A)(i) and shall provide a copy of such assessment and documentation to each spouse and shall retain a copy of the assessment for use under this section. If the request is not part of an application for medical assistance under this subchapter, the State may, at its option as a condition of providing the assessment, require payment of a fee not exceeding the reasonable expenses of providing and documenting the assessment. At the time of providing the copy of the assessment, the State shall include a notice indicating that the spouse will have a right to a fair hearing under subsection (e)(2) of this section.

(2) Attribution of resources at time of initial eligibility determination

In determining the resources of an institutionalized spouse at the time of application for benefits under this subchapter, regardless of any State laws relating to community property or the division of marital property--

(A) except as provided in subparagraph (B), all the resources held by either the institutionalized spouse, community spouse, or both, shall be considered to be available to the institutionalized spouse, and

(B) resources shall be considered to be available to an institutionalized spouse, but only to the extent that the amount of such resources exceeds the amount computed under subsection (f)(2)(A) of this section (as of the time of application for benefits).

(3) Assignment of support rights

The institutionalized spouse shall not be ineligible by reason of resources determined under paragraph (2) to be available for the cost of care where--

(A) the institutionalized spouse has assigned to the State any rights to support from the community spouse;

(B) the institutionalized spouse lacks the ability to execute an assignment due to physical or mental impairment but the State has the right to bring a support proceeding against a community spouse without such assignment; or

(C) the State determines that denial of eligibility would work an undue hardship.

(4) Separate treatment of resources after eligibility for benefits established

During the continuous period in which an institutionalized spouse is in an institution and after the month in which an institutionalized spouse is determined to be eligible for benefits under this subchapter, no

resources of the community spouse shall be deemed available to the institutionalized spouse.

(5) Resources defined

In this section, the term "resources" does not include--

(A) resources excluded under subsection (a) or (d) of section 1382b of this title, and

(B) resources that would be excluded under section 1382b(a)(2)(A) of this title but for the limitation on total value described in such section.

(d) Protecting income for community spouse

(1) Allowances to be offset from income of institutionalized spouse

After an institutionalized spouse is determined or redetermined to be eligible for medical assistance, in determining the amount of the spouse's income that is to be applied monthly to payment for the costs of care in the institution, there shall be deducted from the spouse's monthly income the following amounts in the following order:

(A) A personal needs allowance (described in section 1396a(q)(1) of this title), in an amount not less than the amount specified in section 1396a(q)(2) of this title.

(B) A community spouse monthly income allowance (as defined in paragraph (2)), but only to the extent income of the institutionalized spouse is made available to (or for the benefit of) the community spouse.

(C) A family allowance, for each family member, equal to at least 1/3 of the amount by which the amount described in paragraph (3)(A)(i) exceeds the amount of the monthly income of that family member.

(D) Amounts for incurred expenses for medical or remedial care for the institutionalized spouse (as provided under section 1396a(r) of this title).

In subparagraph (C), the term "family member" only includes minor or dependent children, dependent parents, or dependent siblings of the institutionalized or community spouse who are residing with the community spouse.

(2) Community spouse monthly income allowance defined

In this section (except as provided in paragraph (5)), the "community spouse monthly income allowance" for a community spouse is an amount by which--

(A) except as provided in subsection (e) of this section, the minimum monthly maintenance needs allowance (established under and in accordance with paragraph (3)) for the spouse, exceeds

(B) the amount of monthly income otherwise available to the community spouse (determined without regard to such an allowance).

(3) Establishment of minimum monthly maintenance needs allowance

(A) In general

Each State shall establish a minimum monthly maintenance needs allowance for each community spouse which, subject to subparagraph (C), is equal to or exceeds--

(i) the applicable percent (described in subparagraph (B)) of 1/12 of the income official poverty line (defined by the Office of Management and Budget and revised annually in accordance with section 9902(2) of this title) for a family unit of 2 members; plus

(ii) an excess shelter allowance (as defined in paragraph (4)).

A revision of the official poverty line referred to in clause (i) shall apply to medical assistance furnished during and after the second calendar quarter that begins after the date of publication of the revision.

(B) Applicable percent

For purposes of subparagraph (A)(i), the "applicable percent" described in this paragraph, effective as of--

(i) September 30, 1989, is 122 percent,

(ii) July 1, 1991, is 133 percent, and

(iii) July 1, 1992, is 150 percent.

(C) Cap on minimum monthly maintenance needs allowance

The minimum monthly maintenance needs allowance established under subparagraph (A) may not exceed $1,500 (subject to adjustment under subsections (e) and (g) of this section).

(4) Excess shelter allowance defined

In paragraph (3)(A)(ii), the term "excess shelter allowance" means, for a community spouse, the amount by which the sum of--

(A) the spouse's expenses for rent or mortgage payment (including principal and interest), taxes and insurance and, in the case of a condominium or cooperative, required maintenance charge, for the community spouse's principal residence, and

(B) the standard utility allowance (used by the State under section 2014(e) of Title 7) or, if the State does not use such an allowance, the spouse's actual utility expenses,

exceeds 30 percent of the amount described in paragraph (3)(A)(i), except that, in the case of a condominium or cooperative, for which a maintenance charge is included under subparagraph (A), any allowance under subparagraph (B) shall be reduced to the extent the maintenance charge includes utility expenses.

(5) Court ordered support

If a court has entered an order against an institutionalized spouse for monthly income for the support of the community spouse, the community spouse

monthly income allowance for the spouse shall be not less than the amount of the monthly income so ordered.

(e) Notice and fair hearing

(1) Notice

Upon--

(A) a determination of eligibility for medical assistance of an institutionalized spouse, or

(B) a request by either the institutionalized spouse, or the community spouse, or a representative acting on behalf of either spouse,

each State shall notify both spouses (in the case described in subparagraph (A)) or the spouse making the request (in the case described in subparagraph (B)) of the amount of the community spouse monthly income allowance (described in subsection (d)(1)(B) of this section), of the amount of any family allowances (described in subsection (d)(1)(C) of this section), of the method for computing the amount of the community spouse resources allowance permitted under subsection (f) of this section, and of the spouse's right to a fair hearing under this subsection respecting ownership or availability of income or resources, and the determination of the community spouse monthly income or resource allowance.

(2) Fair hearing

(A) In general

If either the institutionalized spouse or the community spouse is dissatisfied with a determination of--

(i) the community spouse monthly income allowance;

(ii) the amount of monthly income otherwise available to the community spouse (as applied under subsection (d)(2)(B) of this section);

(iii) the computation of the spousal share of resources under subsection (c)(1) of this section;

(iv) the attribution of resources under subsection (c)(2) of this section; or

(v) the determination of the community spouse resource allowance (as defined in subsection (f)(2) of this section);

such spouse is entitled to a fair hearing described in section 1396a(a)(3) of this title with respect to such determination if an application for benefits under this subchapter has been made on behalf of the institutionalized spouse. Any such hearing respecting the determination of the community spouse resource allowance shall be held within 30 days of the date of the request for the hearing.

(B) Revision of minimum monthly maintenance needs allowance

If either such spouse establishes that the community spouse needs income, above the level otherwise provided by the minimum monthly maintenance needs allowance, due to exceptional circumstances resulting in significant financial duress, there shall be substituted, for the minimum monthly maintenance needs allowance in subsection (d)(2)(A) of this section, an amount adequate to provide such additional income as is necessary.

(C) Revision of community spouse resource allowance

If either such spouse establishes that the community spouse resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, there shall be substituted, for the community spouse resource allowance under subsection (f)(2) of this section, an amount adequate to provide such a minimum monthly maintenance needs allowance.

(f) Permitting transfer of resources to community spouse

(1) In general

An institutionalized spouse may, without regard to section 1396p(c)(1) of this title, transfer an amount equal to the community spouse resource allowance (as defined in paragraph (2)), but only to the extent the resources of the institutionalized spouse are transferred to (or for the sole benefit of) the community spouse. The transfer

under the preceding sentence shall be made as soon as practicable after the date of the initial determination of eligibility, taking into account such time as may be necessary to obtain a court order under paragraph (3).

(2) Community spouse resource allowance defined

In paragraph (1), the "community spouse resource allowance" for a community spouse is an amount (if any) by which--

(A) the greatest of--

(i) $12,000 (subject to adjustment under subsection (g) of this section), or, if greater (but not to exceed the amount specified in clause (ii)(II)) an amount specified under the State plan,

(ii) the lesser of (I) the spousal share computed under subsection (c)(1) of this section, or (II) $60,000 (subject to adjustment under subsection (g) of this section),

(iii) the amount established under subsection (e)(2) of this section; or

(iv) the amount transferred under a court order under paragraph (3);

exceeds

(B) the amount of the resources otherwise available to the community spouse (determined without regard to such an allowance).

(3) Transfers under court orders

If a court has entered an order against an institutionalized spouse for the support of the community spouse, section 1396p of this title shall not apply to amounts of resources transferred pursuant to such order for the support of the spouse or a family member (as defined in subsection (d)(1) of this section).

(g) Indexing dollar amounts

For services furnished during a calendar year after 1989, the dollar amounts specified in subsections (d)(3)(C), (f)(2)(A)(i), and (f)(2)(A)(ii)(II) of this section shall be increased by the same percentage as the percentage increase in the consumer price index for all urban consumers (all items; U.S. city average) between September 1988 and the September before the calendar year involved.

(h) Definitions

In this section:

(1) The term "institutionalized spouse" means an individual who--

(A) is in a medical institution or nursing facility or who (at the option of the State) is described in section 1396a(a)(10)(A)(ii)(VI) of this title, and

(B) is married to a spouse who is not in a medical institution or nursing facility;

but does not include any such individual who is not likely to meet the requirements of subparagraph (A) for at least 30 consecutive days.

(2) The term "community spouse" means the spouse of an institutionalized spouse.

Wis. Stat. § 49.455 (1995-96)

49.455 Protection of income and resources of couple for maintenance of community spouse. **(1)** DEFINITIONS. In this section:

(a) "Community spouse" means an individual who is married to an institutionalized spouse.

(b) "Consumer price index" means the consumer price index for all urban consumers, U.S. city average, as determined by the U.S. department of labor.

(c) "Family member" means a minor or dependent child, dependent parent or dependent sibling of an institutionalized or community spouse who resides with the community spouse.

(d) "Institutionalized spouse" means either an individual who is in a medical institution or nursing facility and is married to an individual who is not in a medical institution or nursing facility or an individual who receives services under a waiver under 42 USC 1396n(c) or (d) and is married to an individual who is not in a medical institution or nursing facility and does not receive services under a waiver under 42 USC 1396n(c) or (d).

(e) "Resources" does not include items excluded under 42 USC 1382b(a) or (d) or items that would be excluded under 42 USC 1382b(a)(2)(A) but for the limitation on total value established under that provision.

(2) APPLICABILITY. The department shall use the provisions of this section in determining the eligibility for medical assistance under s. 49.46 or 49.47 and the required contribution toward care of an institutionalized spouse.

(3) ATTRIBUTION OF INCOME. (a) Except as provided in par. (b), no income of a spouse is considered to be available to the other spouse during any month in which that other spouse is an institutionalized spouse.

(b) Notwithstanding ch. 766, for the purposes of sub. (4), the following criteria apply in determining the income of an institutionalized spouse or a community spouse:

1. Except as determined under subd. 2. or 3., unless the instrument providing the income specifically provides otherwise:

a. Income paid solely in the name of one spouse is considered to be available only to that spouse.

b. Income paid in the names of both spouses is considered to be available one-half to each spouse.

c. Income paid in the name of either or both spouses and to one or more other persons is considered to be available to each spouse in proportion to the spouse's interest or, if payment is made to both spouses and each spouse's individual interest is not specified, one-half of the joint interest is considered to be available to each spouse.

2. Except as provided in subd. 3., if there is no trust or other instrument establishing ownership, income received by a couple is considered to be available one-half to each spouse.

3. Subdivisions 1. and 2. do not apply to income other than income from a trust if the institutionalized spouse establishes, by a preponderance of the evidence, that the ownership interests in the income are other than as provided in subds. 1. and 2.

(4) PROTECTING INCOME FOR COMMUNITY SPOUSE. (a) After an institutionalized spouse is determined to be eligible for medical assistance, in determining the amount of that institutionalized spouse's income that must be applied monthly to payment for the costs of care in the institution, the department shall deduct the following amounts in the following order from the institutionalized spouse's income:

1. The personal needs allowance under s. 49.45(7)(a).

2. The community spouse monthly income allowance calculated under par. (b) or the amount of income of the institutionalized spouse that is actually made available to, or for the benefit of, the community spouse, whichever is less.

3. A family allowance for each family member equal to one-third of the amount by which the family member's monthly income is exceeded by the following:

a. Beginning on September 30, 1989, and ending on June 30, 1991, 122% of one-twelfth of the poverty line for a family of 2 persons.

b. Beginning on July 1, 1991, and ending on June 30, 1992, 133% of one-twelfth of the poverty line for a family of 2 persons.

c. Beginning on July 1, 1992, 150% of one-twelfth of the poverty line for a family of 2 persons.

4. The amount incurred as expenses for medical or remedial care for the institutionalized spouse.

(b) The community spouse monthly income allowance equals the greater of the following:

1. The minimum monthly maintenance needs allowance determined under par. (c) or the amount determined at a fair hearing under sub. (8)(c), if such an amount has been determined, minus the amount of monthly income otherwise available to the community spouse.

2. The amount of monthly support which a court orders the institutionalized spouse to pay for the support of the community spouse.

(c) 1. For any year, the minimum monthly maintenance needs allowance equals the lesser of the amount determined under subd. 2., or the sum of the following:

a. One-twelfth of 200% of the poverty line for a family of 2 persons.

b. Any excess shelter allowance under par. (d).

2. The minimum monthly maintenance needs allowance in a year may not exceed $1,500 increased by the same percentage as the percentage increase in the consumer price index between September 1988 and September of the year before the year involved.

– 3. In making the calculation under subd. 1.a., when the poverty line is revised the department shall use the revised amount starting on the first day of the 2nd calendar quarter beginning after the date of publication of the revision.

(d) The excess shelter allowance equals the amount by which 30% of the amount determined under par. (c)1.a. is exceeded by the sum of the following:

1. The community spouse's expenses for rent or mortgage principal and interest, taxes and insurance for his or her principal residence and, if the community spouse lives in a condominium or cooperative, any required maintenance charge.

2. The standard utility allowance established under 7 USC 2014(e), except that if the community spouse lives in a condominium or cooperative for which the maintenance charge includes utility expenses, the standard utility allowance under 7 USC 2014(e) is reduced by the amount of the utility expenses included in the maintenance charge.

(5) RULES FOR TREATMENT OF RESOURCES. (a) 1. The department shall determine the total value of the ownership interest of the institutionalized spouse plus the ownership interest of the community spouse in resources as of the beginning of the first continuous period of institutionalization beginning after September 29, 1989. The spousal share of resources equals one-half of that total value.

2. At the beginning of the first continuous period of institutionalization beginning after September 29, 1989, upon the request of an institutionalized spouse or a community spouse and the receipt of necessary documentation, the department shall assess and document the total value of resources under subd. 1. and shall provide a copy of the assessment and documentation to each spouse and retain a copy for departmental use. If the request is not part of an

application for medical assistance, the department may charge a fee not exceeding the reasonable expenses of providing and documenting the assessment. When the department provides a copy of an assessment, it shall provide notice that a spouse has the right to a fair hearing under sub. (8) after an application for medical assistance is filed.

(b) Notwithstanding ch. 766, in determining the resources of an institutionalized spouse at the time of application for medical assistance, the amount of resources considered to be available to the institutionalized spouse equals the value of all of the resources held by either or both spouses minus the greatest of the amounts determined under sub. (6)(b)1. to 4.

(c) The amount of resources determined under par. (b) to be available for the cost of care does not cause an institutionalized spouse to be ineligible for medical assistance, if any of the following applies:

1. The institutionalized spouse has assigned to the state any rights to support from the community spouse.

2. The institutionalized spouse lacks the ability to execute an assignment under subd. 1. due to a physical or mental impairment but the state has the right to bring a support proceeding against the community spouse without an assignment.

3. The department determines that denial of eligibility would work an undue hardship.

(d) During a continuous period of institutionalization, after an institutionalized spouse is determined to be eligible for medical assistance, no resources of the community spouse are considered to be available to the institutionalized spouse.

(6) PERMITTING TRANSFER OF RESOURCES TO COMMUNITY SPOUSE. (a) Notwithstanding s. 49.453(2), an institutionalized spouse may transfer an amount of resources equal to the community spouse resource allowance determined under par. (b) to, or for the sole benefit of, the community spouse without becoming ineligible for medical assistance for the period of ineligibility under s. 49.453(3) as a result of the transfer. The institutionalized spouse shall make the transfer as soon as practicable after the initial determination of eligibility for medical assistance, taking into account the amount of time that is necessary to obtain a court order under par. (c).

(b) The community spouse resource allowance equals the amount by which the amount of resources otherwise available to the community spouse is exceeded by the greatest of the following:

1. In any year, $12,000 increased by the same percentage as the percentage increase in the consumer price index between September 1988 and September of the year before the calendar year involved.

1m. $50,000.

2. The lesser of the following:

a. The spousal share computed under sub. (5)(a)1.

b. In any year, $60,000 increased by the same percentage as the percentage increase in the consumer price index between September 1988 and September of the year before the year involved.

3. The amount established in a fair hearing under sub. (8)(d).

4. The amount transferred under a court order under par. (c).

(c) If a court has entered a support order against a community spouse, s. 49.453 does not apply to resources transferred under the order for the support of the community spouse or a family member.

(7) NOTICE. The department shall notify both spouses upon a determination of medical assistance eligibility of an institutionalized spouse, or shall notify the spouse making the request upon a request by either an institutionalized spouse or a community spouse, of all of the following:

(a) The amount of the community spouse monthly income allowance calculated under sub. (4)(b).

(b) The amount of any family allowances under sub. (4)(a)3.

(c) The method for computing the amount of the community spouse resource allowance under sub. (6)(b).

(d) The spouse's right to a fair hearing under sub. (8) concerning ownership or availability of income or resources and the determination of the community spouse monthly income or resource allowance.

(8) FAIR HEARING. (a) An institutionalized spouse or a community spouse is entitled to a departmental fair hearing concerning any of the following:

1. The determination of the community spouse monthly income allowance under sub. (4)(b).

2. The determination of the amount of monthly income otherwise available to the community spouse used in the calculation under sub. (4)(b).

3. After an application for medical assistance benefits is filed, the computation of the spousal share of resources under sub. (5)(a)1.

4. The attribution of resources under sub. (5)(b).

5. The determination of the community spouse resource allowance under sub. (6)(b).

(b) If the institutionalized spouse has made an application for medical assistance, and a fair hearing is requested under par. (a) concerning the determination of community spouse resource allowance, the department shall hold the hearing within 30 days after the request.

(c) If either spouse establishes at a fair hearing that, due to exceptional circumstances resulting in financial duress, the community spouse needs income above the level provided by the minimum monthly maintenance needs allowance determined under sub. (4)(c), the department shall determine an amount adequate to provide for the community spouse's needs and use that amount in place of the minimum monthly maintenance needs allowance in determining the community spouse monthly income allowance under sub. (4)(b).

(d) If either spouse establishes at a fair hearing that the community spouse resource allowance determined under sub. (6)(b) without a fair hearing does not generate enough income to raise the community spouse's income to the minimum monthly maintenance needs allowance under sub. (4)(c), the department shall establish an amount to be used under sub. (6)(b)3. that results in a community spouse resource allowance that generates enough income to raise the community spouse's income to the minimum monthly maintenance needs allowance under sub. (4)(c). Except in exceptional cases which would result in financial duress for the community spouse, the department may not establish an

amount to be used under sub. (6)(b)3. unless the institutionalized spouse makes available to the community spouse the maximum monthly income allowance permitted under sub. (4)(b) or, if the institutionalized spouse does not have sufficient income to make available to the community spouse the maximum monthly income allowance permitted under sub. (4)(b), unless the institutionalized spouse makes all of his or her income, except for an amount equal to the sum of the personal needs allowance under sub. (4)(a)1. and any family allowances under sub. (4)(a)3. paid by the institutionalized spouse and the amount incurred as expenses for medical or remedial care for the institutionalized spouse under sub. (4)(a)4., available to the community spouse as a community spouse monthly income allowance under sub. (4)(b).

DEPARTMENT OF HEALTH & HUMAN SERVICES

Health Care Financing Administration
105 West Adams Street
15th Floor
Chicago, Illinois 60603

December 1993

CHICAGO REGIONAL STATE LETTER NO.: 51-93

Subject: Spousal Impoverishment and Hearing Officer's Authority to Protect Additional Resources--INFORMATION

Some State Medicaid agencies have recently posed questions concerning the authority of State hearing officers to adjust the State resource standards under spousal impoverishment procedures in determining eligibility. The specific issue is whether a hearing officer may allow resources in excess of the State established maximum when a couple contends that such additional resources are necessary in order to bring the community spouse's income up to State levels.

As explained in more detail below and in the enclosed statement, State hearing officers should be allowed to use Section 1924(e)(2)(C) to increase the protected amount of resources (PRA) only after eligibility has been established for the institutionalized spouse, not before eligibility is established or during that process. Enclosed for your information is a discussion of the issue and certain guidelines which hearing officers have to follow using Section 1924(e)(2)(C).

An example is a State's determination of resource eligibility for an institutionalized spouse with $50,000 total assets. The State has set the community spouse's resource allowance at

$25,000. Using the example, the institutionalized spouse would have to reduce his resources to the $2,000 SSI resource standard for an individual before he could be eligible for Medicaid.

Applications which do not meet the above requirements are being properly denied. Appeals have been filed, however, on the basis that the community spouse needs more than $25,000 in *income-producing* resources in order to meet living expenses. If State hearing officers approve these appeals, the State's resource test is rendered moot. Such determinations circumvent normal eligibility standards imposed by the State, and are in conflict with *State Medicaid Manual* instructions which indicate that additional allocations of resources are a *post-eligibility* action rather than one being done in order to establish eligibility. Please refer to the enclosed policy statement for further discussion.

If you have any questions, please contact your Medicaid Program Specialist.

/s/
David DuPre, Chief
Medicaid Operations Branch
Division of Medicaid

Originating Component: Medicaid Operations Branch
Division of Medicaid

Enclosure

SPOUSAL IMPOVERISHMENT AND HEARING OFFICER'S AUTHORITY TO PROTECT ADDITIONAL RESOURCES

Section 1924(e)(2)(C), allows hearing officers to increase the protected resources amount (PRA) rather than the "resource allowance." The PRA is the amount of resources protected for the community spouse in determining the institutionalized spouse's eligibility for Medicaid. Hearing officers may use section 1924(e)(2)(C) in this manner, but only after following certain rules, as explained below.

These rules limit the practice of institutionalized spouses sheltering with their community spouses large amounts of valuable resources which do not (by chance or design) generate much income. For example, a State may have protected for a community spouse $70,000 when it determined the institutionalized spouse's eligibility. The community spouse, in turn, might have invested the $70,000 at a nominal 1% rate of return, then requested a section 1924(e)(2)(C) hearing to raise her resource allowance in order to generate more income. Using this approach, an institutionalized spouse could arrange to protect with the community spouse a very sizeable amount of resources. We do not believe that the Medicaid program should subsidize this practice.

Section 1924(e)(2)(C) allows a couple to revise the resource allowance (which we are reading as the PRA) if the PRA does not generate enough income to bring the community spouse's income up to the minimum monthly maintenance needs allowance (the "monthly maintenance needs standard") in discussing the post-eligibility formula under section 1924(d). Section 1924 includes specific formulas for preserving particular amounts of income for the community spouse. Section 1924(c)(2) and (f)(2)(A) provide a formula for calculating the portion of a couple's combined resources that must be preserved for the community spouse. Similarly,

section 1924(d)(2) contains a complex formula based on the Federal poverty guidelines and each individual spouse's residential expenses to determine exactly how much of the institutionalized spouse's income must be protected in the post-eligibility calculation for the community spouse.

It is our view that Congress meant, in almost all cases, for the community spouse to have his or her resources and income protected in the manner dictated by these precise and detailed formulas. We believe any hearings which are allowed under section 1924(e) for altering either the income allowance or PRA are designed for exceptional circumstances under which the formulas do not achieve the desired results. For income, this would cover situations in which the amount of income normally provided to a community spouse would be inadequate because of unusual circumstances resulting in financial duress. For protected resources, this would be situations in which the avenue for protecting income under section 1924(d) does not provide the amount of income Congress believed to be necessary for the spouse to live in the community (as reflected in the monthly maintenance needs standard).

As a result, we are interpreting section 1924(e)(2)(C) as making available to a couple a hearing for purposes of raising the PRA only when the institutionalized spouse has used the usual means of protecting income under section 1924(d) to the maximum extent possible. We see no reason to afford a couple a hearing to alter the usual formula when that formula will provide the protection that Congress contemplated. As a result, we are requiring that the institutionalized spouse must first make available the maximum amount of income he or she can as a community spouse monthly income allowance under section 1924(d)(1)(B) before being allowed to raise the PRA under section 1924(e)(2)(C). The State would have the discretion to determine the maximum amount of income that the institutionalized spouse can afford to protect for the community spouse.

In order to avoid the result of community spouses sheltering valuable resources which generate little income, we believe the law can be interpreted to require that a hearing officer calculate the income-bearing value of resources the community spouse wishes to acquire at a reasonable rate. Section 1924(e)(2)(C) says that the State must substitute for the resource allowance an amount of resources that is "adequate to provide" the minimum monthly maintenance needs standard which is discussed in the post-eligibility formula under section 1924(d). Since the statute does not provide any requirements for determining an "adequate" amount, we have some flexibility in interpreting what is "adequate."

Since a State must judge what resources are "adequate" to provide the maintenance needs standard, guides to the States in valuing resources are appropriate. If certain resources do not generate any income, they cannot help the community spouse to receive the maintenance needs standard. Therefore, States should not count these resources as part of the "adequate amount" of additional resources necessary to achieve this income level. Moreover, a State should value the income-producing capacity of a resource based upon its saleable or market value, invested at a reasonable rate of return if it were invested in a safe investment such as government-backed securities. In addition, States should require that their hearing officers value any resources which are actually earning at a higher rate of return at their actual rate of return.

The same rules should apply when the hearing officer assesses the income-bearing value of the current PRA in order to determine how much the community spouse should receive in additional resources. We base this conclusion on the language in section 1924(e)(2)(C). The statute allows either spouse to establish that the community spouse resource allowance is inadequate, in relation to the amount of income

generated by such an allowance, and to substitute "an amount adequate to provide for [the spouse's minimum maintenance needs]." We interpret this provision to mean that the adequate amount should be measured based upon a reasonable assessment of the income producing capacity of both spouses' resources. This would base the income producing value of resources on the amount of income a resource allowance of this amount (or value) should generate, rather than the income the community spouse's actual resource allowance generates.

The State must also consider the community spouse's existing income in determining how much more income must be generated by resources in order to provide this spouse with the monthly maintenance needs standard. We base this conclusion on the wording of section 1924(e)(2)(C). This provision says that, if the income generated by the resource allowance is inadequate *to raise the community spouse's income* to the minimum monthly maintenance needs standard, there shall be substituted for the resource allowance an amount adequate to provide such a minimum monthly maintenance needs standard. This provision refers to the community spouse's existing income as a base amount, to which a State may add additional income by way of increasing the community spouse's share of the couple's income-generating resources.

Also, the community spouse's income will include whatever portion of the monthly income allowance the institutionalized spouse will make available to him or her. Since the institutionalized spouse must transfer the income allowance to the community spouse to have it deducted in the post-eligibility calculation, the State should include this income as available to the community spouse when it counts that spouse's own income.

Prepared by Medicaid Bureau 11/16/93

DEPARTMENT OF HEALTH & HUMAN SERVICES — Health Care Financing Administration

Memorandum

MAR 3 1994

FROM : Director
Medicaid Bureau

SUBJECT: Spousal Impoverishment and Hearing Officer's Authority to Protect Additional Resources

TO : All Regional Administrators
ATTN: Associate Regional Administrator, Division of Medicaid

A State has raised some concerns to us about a November 18, 1993 memorandum which we sent to the Dallas Regional Office. This memorandum dealt with the subject of allowing individuals who are covered under the spousal impoverishment provisions to have a hearing to raise the amount of resources protected for the community spouse. We sent copies of this memorandum to all regional administrators. The November 18th memorandum said that hearing officers must follow the guidelines that were attached to the memorandum. Also, the memorandum suggested that a couple's right to a hearing to raise the protected resource amount (PRA) was available only as part of the post eligibility process.

The spousal impoverishment provisions in § 1924 of the Social Security Act are extremely complicated. They are in places ambiguous and incomplete. We believe that this is particularly the case in regard to the provision which allows a couple to have a hearing to raise the PRA. Because this issue is complex, it may have resulted in our failing to clearly explain our position on the subject in some of our policy

issuances. We would like at this time to clarify our current policy.

Although our memorandum suggested that the hearing to raise the PRA is available only as part of the post-eligibility process, we meant that the hearing is available as part of the institutionalized spouse's initial eligibility determination, when the spouses' resources are pooled and a specific amount is protected for the community spouse. We meant "after eligibility" only in the sense that an institutionalized spouse who is found ineligible can resort to a hearing to try to raise the PRA before reapplying.

The memorandum also appears to require that States follow the guidelines that were attached to the memorandum. Among these guidelines was the requirement that the institutionalized spouse first make available to the community spouse the largest possible income allowance (as determined by the State) under the post-eligibility calculation before he or she can raise the PRA. We did not intend to mandate the policies in the guidelines; they are instead "guidance" which we believe is a reasonable interpretation of the spousal impoverishment provisions. That is, States are not required to follow these "guidelines," but may follow other reasonable interpretations of the law.

The State Medicaid Manual (SMM) provision which covers this issue is located in § 3262.3. It says that there can be no substitutions (for the PRA) when institutionalized spouses do not make available monthly income allowances to community spouses (the "income first" rule). We have never intended to mandate this policy. The transmittal page that was issued with the manual provision contained the following note:

> Although this manual is interpretive, it contains certain requirements which are specified by statute and are binding, as well as

"derived" policies which build upon the statutory requirements. These derived policies are identified as such and are in no way binding. You are free to adopt reasonable alternative interpretations with respect to them until we adopt final regulations addressing these policies.

The "income first" rule is not specified by the statute and as such is a "derived" policy. As a result, the policy should not be considered as binding. However, because we tried to issue the SMM sections covering spousal impoverishment as quickly as possible, we inadvertently failed to identify this policy as a "derived" policy within the text of the SMM. As a result, we believe that States may have been somewhat confused about our position on the "income first" issue. We would now like to clarify that States have the option to use the "income first" rule or to apply some other reasonable interpretation of the law until we have issued final regulations which specifically address this issue.

Sally K. Richardson

DEPARTMENT OF HEALTH & HUMAN SERVICES

HEALTH CARE FINANCING ADMINISTRATION
105 WEST ADAMS STREET
15TH FLOOR
CHICAGO, ILLINOIS 60603

July 1994

CHICAGO REGIONAL STATE LETTER NO.: 22-94

Subject: Spousal Impoverishment and Hearing Officer's Authority to Protect Additional Resources--INFORMATION

Chicago Regional State Letter (CRSL) #51-93, concerning the above topic, indicated that hearing officers should follow the guidelines that were enclosed with the letter. The letter also indicated that a couple's right to a hearing to raise the protected resource amount (PRA) was available only as part of the post-eligibility process. Questions raised about these issues have caused reexamination of our stated policies.

The spousal impoverishment provisions in §1924 of the Social Security Act are extremely complicated. They are in places ambiguous and incomplete. We believe that this is particularly the case in regard to the provision which allows a couple to have a hearing to raise the PRA. Due to these difficulties, we may have failed to clearly explain our position on the subject in our policy issuances. We would like at this time to clarify our current policy.

Although the CRSL indicated that the hearing to raise the PRA is available only as part of the post-eligibility process, we are correcting that statement. The *hearing* is available as part of the institutionalized spouse's initial eligibility

determination, when the spouses' resources are pooled and a specific amount is protected for the community spouse. The phrase "after eligibility" means that an institutionalized spouse who is found ineligible can resort to a hearing to try to raise the PRA before reapplying.

The CRSL also appears to require that States follow the guidelines enclosed with the letter. Among these guidelines was the requirement that the institutionalized spouse first make available to the community spouse the largest possible income allowance (as determined by the State) under the post-eligibility calculation before he or she can raise the PRA. We did not intend to mandate the policies in the guidelines; they are instead "guidance" which we believe is a reasonable interpretation of the spousal impoverishment provisions. That is, States are not required to follow these guidelines, but may follow other reasonable interpretations of the law.

The State Medicaid Manual (SMM) provision which covers this issue is located in §3262.3. It says that there can be no substitutions (for the PRA) when institutionalized spouses do not make available monthly income allowances to community spouses (the "income first" rule). We have never intended to mandate this policy. The transmittal page that was issued with the manual provision contained the following note:

> Although this manual is interpretive, it contains certain requirements which are specified by statute and are binding, as well as "derived" policies which build upon the statutory requirements. These derived policies are identified as such and are in no way binding. You are free to adopt reasonable alternative interpretations with respect to them until we adopt final regulations addressing these policies.

The "income first" rule is not specified by the statute and as such is a "derived" policy. As a result, the policy should not be considered as binding. However, because we tried to issue the SMM sections covering spousal impoverishment as quickly as possible, we inadvertently failed to identify this policy as a "derived" policy within the text of the SMM. As a result, we believe that States may have been somewhat confused about our position on the "income first" issue. We would now like to clarify that States have the option to use the "income first" rule or to apply some other reasonable interpretation of the law until we have issued final regulations which specifically address this issue.

If you have any questions, please contact your Medicaid Program Specialist.

/s/

Alan Freund, Acting Chief
Medicaid Operations Branch
Division of Medicaid

Originating Component: Medicaid Operations Branch
Division of Medicaid

THE SECRETARY OF HEALTH AND HUMAN SERVICES
WASHINGTON, D.C. 20201

MAR 28 1996

The Honorable George V. Voinovich
Governor
State of Ohio
Columbus, Ohio 43266-0601

Dear Governor Voinovich:

Thank you for your letter regarding the Medicaid spousal impoverishment provisions and the decision of the Ohio court in *Chambers v. Ohio Department of Human Services*.

Let me assure you that the Department views the State of Ohio's income first policy as a legally permissible interpretation of the Medicaid statute. I am enclosing a March 3, 1994, Health Care Financing Administration memorandum which reflects this Departmental position.

In light of our support for State flexibility, the Department has no plans to mandate the income first rule. The rule will continue to be an option for States.

Sincerely,

/s/
Donna E. Shalala

Enclosure